NO. 79-1944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner

vs.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

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Filing of Petition for Certiorari by Petitioner, J. Truett Payne Company	June 10, 1980
Supreme Court's Order Granting J. Truett Payne Company's Petition for Certiorari	Oct. 6, 1980

CHRYSLER CREDIT CORPORATION, a corporation, Plaintiff,

v.

J. TRUETT PAYNE, INC., etc., et al., Defendants-Third Party Plaintiffs-Appellees,

v.

CHRYSLER MOTORS CORPORATION, a corporation, Third Party Defendant-Additional Party Defendant-Appellant.

No. 77-2331.

United States Court of Appeals, Fifth Circuit.

Dec. 7, 1979.

Rehearing and Rehearing En Banc Denied Jan. 18, 1980.

Appeal from the United States District Court for the Northern District of Alabama.

Before GODBOLD, RONEY and FRANK M. JOHNSON, Jr., Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

This is an appeal from a treble damages judgment awarded against Chrysler Motors Corporation for price discrimination in violation of section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.[1]

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[1]Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13 (a), provides in part as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of com-

From January 1970 through August 1974, the period at issue, Chrysler Motors was a wholly owned subsidiary of Chrysler Corporation, engaged in wholesaling Chrysler-Plymouth automobiles to retail dealerships throughout the country. J. Truett Payne, Inc., was one of four such dealerships in the Birmingham, Alabama, area.

Payne went out of business in May 1974. In September 1974, Chrysler Credit Corporation filed suit for the recovery of certain unrepaid loans. Part of Payne's response was the filing of this price discrimination claim against Chrysler Motors.

Payne alleged that as a result of certain discriminatory sales incentive programs conducted by Chrysler Motors among its dealerships in the Birmingham area, Payne had been forced to pay higher prices for Chrysler automobiles than had its competitors. Payne claimed that because of the higher prices it lost sales and profits, and was eventually forced out of business. Payne sought treble damages under section 4 of the Clayton Act.[2]

In defense, Chrysler Motors maintained that the sales incentive programs were available on a non-discriminatory basis to all Chrysler dealerships in the Birmingham area, including Payne, and denied that they had had an adverse effect on competition or that they had injured Payne.

The district judge severed trial of this Chrysler Motors issue from trial of the Chrysler Credit issues. Testimony

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merce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination. . . ."

[2]Section 4 of the Clayton Act, 15 U.S.C. § 15, provides as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

was taken for six days. Chrysler's motions for a directed verdict made at the close of Payne's case and at the close of all the evidence were denied. The jury reached a verdict and award against Chrysler of $111,247.48 (Payne had asked for $180,000), which the court trebled. Chrysler's motion for judgment notwithstanding the verdict or for a new trial was denied, and Chrysler filed this appeal.

[1] It is well established that in order to recover treble damages under section 4 of the Clayton Act, a plaintiff must prove (1) a violation of the antitrust laws, (2) cognizable injury attributable to the violation, and (3) at least the approximate amount of the damage. *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 270 (5th Cir. 1979); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 694 (5th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir.), *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974).

[2] We find it unnecessary to consider whether Payne proved that the Chrysler incentive programs violated the Robinson-Patman Act. Because Payne failed to introduce substantial evidence of injury attributable to the programs, much less substantial evidence of the amount of such injury, the district court erred in refusing Chrysler's motions for directed verdict and in denying Chrysler's motion for judgment notwithstanding the verdict.

I. Cognizable Injury

To show that Chrysler's incentive programs caused it to lose sales, Payne introduced the unsupported testimony of J. Truett Payne, its owner, that customers and salesmen had told him that the dealership was being undersold, and that some salesmen had quit as a result. Payne also introduced

evidence showing that its share of retail Chrysler-Plymouth sales in the Birmingham area was 24% in 1970, 27% in 1971, 23% in 1972, and 25% in 1973. Payne contends that it was proper to infer that the 4% drop in 1972 was a result of the incentive program.[3]

To show lost profits by reason of the programs, Payne introduced only the unsupported testimony of Mr. Payne that he was forced to lower prices in order to meet competition and that for the same reason the dealership had to, or possibly had to, give greater allowances on used-car trade-ins.

In an effort to show that the programs forced the dealership out of business, Payne relied on merely conclusory statements to that effect by Mr. Payne and an expert witness.[4]

[3, 4] Under *Boeing Co. v. Shipman*, 411 F.2d 365, 373-77 (5th Cir. 1969) (en banc) (standard for directed verdict and judgment notwithstanding the verdict), this showing was clearly not such as to allow the case to go to the jury. In an antitrust action, as noted above, the plaintiff must show that the defendant's conduct materially contributed to his injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S.Ct. 1562, 23 L.Ed. 2d 129 (1969). He must do so "as a matter of fact and with a fair degree of certainty." *Terrell v. Household Goods Carriers' Bureau, supra*, 494 F.2d at 20. Conclusory statements by the plaintiff, without evidentiary support, as to the fact of damage caused by the alleged antitrust violation

[3]Payne also contends that the 2% increase in 1973 was the result of a 1973 revision of the incentive programs that resulted in sales quotas more favorable toward Payne. While it is true that certain of the incentive programs were so revised, none of these types of programs operated in 1973. The 1973 increase cannot be attributed to their revision.

[4]The expert prefaced his statement on the issue with the comment, "I really can't tell you without having, you know — it's a hypothetical question."

are not sufficient. Evidence of a slight decrease in market share roughly coincident with the alleged violation is not sufficient either.[5] The plaintiff must put forth substantial evidence. If he fails to do so, the defendant is entitled to a directed verdict. *See, e. g., Comfort-Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373, 1383 (5th Cir. 1979); *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1371 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977); *Foremost-McKesson v. Instrumentation Laboratory*, 527 F.2d 417, 418-20 (5th Cir. 1976); *Shumate & Co. v. National Ass'n of Securities Dealers, Inc.*, 509 F.2d 147, 153 (5th Cir.), *cert. denied*, 423 U.S. 868, 96 S.Ct. 131, 46 L.Ed.2d 97 (1975).

[5, 6] Payne maintains on this appeal that in a section 2(a) case mere proof of the alleged price discrimination is sufficient to establish injury by reason of an antitrust violation entitling the plaintiff to damages. This Robinson-Patman "automatic damages" concept, as it has come to be called, has some precedential support. *See Fowler Manufacturing Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012, 90 S.Ct. 571, 24 L.Ed.2d 503 (1970); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 996 (8th Cir.), *cert. denied*, 326 U.S. 773, 66 S.Ct. 231, 90 L.Ed. 467 (1945). But we decline to follow it. As the Supreme Court ruled in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), the antitrust laws do not provide

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[5] *Cf. Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 547 (5th Cir. 1978), *cert. denied*, ... U.S. ....., 100 S.Ct. 262, 62 L.Ed.2d 180 (1979) (decrease in income, without more, does not establish fact of damage). In this case, as Mr. Payne himself testified, there was evidence that the material cause of the 4% decrease in market share Payne experienced in 1972 was the relocation of a competing Chrysler-Plymouth dealer into Payne's immediate sales area, and not the Chrysler incentive programs.

a damages remedy for all losses traceable to conduct violating the antitrust laws, only for losses that are part of the anticompetitive effect of such conduct. When a seller charges different prices to different purchasers, as alleged here, injury to competition does not necessarily result. Both the statute and the courts recognize this. 15 U.S.C. § 13 (a). *See, e. g., United States v. United States Gypsum Co.*, 438 U.S. 422, 450, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). Competition is harmed only to the extent that the favored purchaser, by use of the discriminatory price difference, actually draws sales or profits from his unfavored competitor. *See, e. g., Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965, 77 S.Ct. 1049, 1 L.Ed.2d 914 (1957); *Uniroyal, Inc. v. Jetco Auto Service, Inc.*, 461 F.Supp. 350, 357-59 (S.D.N.Y. 1978); *McCaskill v. Texaco, Inc.*, 351 F.Supp. 1332, 1341 (S.D.Ala. 1972), *aff'd sub nom. Harrelson v. Texaco, Inc.*, 486 F.2d 1400 (5th Cir. 1973); Handler, *Changing Trends in Antitrust Doctrines*, 77 *Colum.L.Rev.* 979, 992-93 (1977). *See also Perkins v. Standard Oil Co.*, 395 U.S. 642, 648-49, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969) (implying that disfavored purchaser must show more than mere price difference to recover damages). As discussed above, there is no evidence, much less substantial evidence, that such was the case here.

[7, 8] Payne's reliance on *FTC v. Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948), and its progeny is misplaced. In *Morton Salt*, the Supreme Court held that a violation of Robinson-Patman Act § 2 (a) may be inferred from a substantial price difference. 334 U.S. at 46-47, 68 S.Ct. 822. But the showing necessary to establish a section 2 (a) violation is not the same as the showing necessary to support a private action for damages. The Robin-

son-Patman Act is an incipiency statute.[6] Price discrimination which threatens competition but which has not caused any actual competitive injury may be held to violate the statute even though it will not support an action for damages. *See* Areeda, *Antitrust Violations Without Damage Recoveries,* 89 *Harv.L.Rev.* 1127, 1127-28 (1976). *See also Gottesman v. General Motors Corp.,* 436 F.2d 1205, 1210 (2d Cir.), *cert. denied,* 403 U.S. 911, 91 S.Ct. 2208, 29 L. Ed.2d 689 (1971) (private injury does not necessarily accompany public injury). What *Morton Salt* found inferable from a substantial price difference was a threat to competition sufficient to violate the statute. 334 U.S. at 46-47, 68 S.Ct. 822. Even assuming that *Morton Salt* is still viable, it is of no help to Payne. In order to recover damages, Payne had to show more than just a threat of antitrust injury. As discussed above, it failed to do so.

II. Amount of Damage

Our conclusion that Chrysler was entitled to a directed verdict is buttressed by Payne's failure to adequately prove the amount of its alleged injury.

Payne relied on its calculation of the alleged price discrimination to establish the amount of its alleged lost sales and profits. There is no necessary correlation, however, and Payne failed to establish one.

To indicate the going concern value of the dealership at the time it was allegedly forced out of business, Payne relied on two alternative methods of calculation. Under the first, Payne's expert assumed a good will value for the dealership of $52,000 in 1955 and appreciated this amount over 20

[6]Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), proscribes price discrimination "where the effect of such discrimination *may* be substantially to lessen competition. . . ." (Emphasis added).

years at an annual rate of 4%. The expert testified that the $52,000 figure was not based on an examination of Payne's financial statements. It represented an unsupported estimate by Mr. Payne. The 4% rate was a rough average of the prevailing inflation and prime interest rates from 1955 until the time Payne folded. Under the second method, Payne's expert discounted projections of what the dealership's profits would have been if it had continued in business free of the incentive programs. The expert testified that he did not take into account local market changes or conditions. The projections were apparently nothing more than some of Payne's past earnings roughly adjusted according to Chrysler's performance nationwide or the performance of the automobile industry in general. If Chrysler or the industry had a good year it was assumed, without an explanation why, that Payne would have a good year also.

[9-11] As was the case with Payne's fact of damage evidence, this showing was clearly not such as to allow the case to go to the jury. In an antitrust damages action, as noted above, the plaintiff must establish the amount as well as the fact of damage. The burden of proving the amount of damage is less severe than the burden of proving the cognizable injury. *See, e. g., Story Parchment Co. v. Patterson Parchment Co.,* 282 U.S. 555, 562, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Terrell v. Household Goods Carriers' Bureau, supra,* 494 F.2d at 23-24. But the plaintiff must put forth substantial evidence. The burden is not satisfied by mere speculation or guess work. *See, e. g., Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 264, 66 S.Ct. 815, 90 L.Ed. 1040 (1946); *Keener v. Sizzler Family Steak Houses,* 597 F.2d 453, 457 (5th Cir. 1979). Payne failed to meet this burden. A price difference without more does not indicate the amount of lost sales or profits. Self-serving and unsupported assumptions cannot sustain a calculation of going

concern value. On this ground as well, Chrysler was entitled to a directed verdict. *See, e. g., Kestenbaum v. Falstaff Brewing Corp., supra,* 514 F.2d at 695; *Copper Liquor, Inc. v. Adolph Coors Co.,* 506 F.2d 934, 953-55 (5th Cir. 1975).

The district court is directed to enter judgment for Chrysler.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN TRUETT PAYNE

[TR. 40]

Q. And when is the first time you became a Chrysler direct dealer?

A. In 1944 or '45.

Q. Where were you located, Mr. Payne?

A. 408 South 21st Street in Birmingham.

Q. How long had you or did you remain in that location?

A. About ten years.

Q. And were you selling Chryslers after you moved from that location?

[TR. 41]

A. Yes, sir.

Q. Excuse me. When did you acquire the J. Truett Payne Company?

A. Well, we bought out Leseur Motors in 1955 and merged the two companies.

Q. Now, in 1965 were you selling Chrysler automobiles, your company?

A. Yes, sir.

Q. Was Leseur?

A. Yes, sir.

Q. And what was the price, or the purchase price that you paid for this buying of the Leseur Motors?

A. I believe I paid forty-five thousand dollars for his fixtures and what equipment he had in parts.

Q. All right. Was there anything else included in that price?

A. No, sir.

Q. Out of that price, Mr. Payne, that you paid for Leseur, did he have forty-five thousand dollars worth of parts and fixtures on hand or was there anything else in that price?

A. No. I would believe that, as well as I remember, that about half of

that would be for equipment and parts and the other half for goodwill, I guess.

Q. Had he been in business a while?

[TR. 42]

A. Several years. I don't remember how long.

Q. All right. In any event, you bought him out and you started selling Chryslers with his inventory, is that correct?

A. Yes, sir.

Q. Did you have an inventory of your own?

A. I had an inventory of my own and then we took over some cars that he had, but we bought them from Chrysler.

Q. All right. What was the net worth of your business at that time, J. Truett Payne Company, the Chrysler dealer?

A. I would think around seventy-five

hundred or a thousand dollars. I don't know.

Q. Was any of that portion of that business amount made up of goodwill or was it all stock merchandise, parts?

A. In mine?

Q. Yes, sir, in yours.

A. I would say it was all in merchandise.

Q. All right. Since 1955 did you operate J. Truett Payne Company Chrysler-Plymouth dealership just like you operated it through 1974? Have you been operating it --

A. Yes.

[TR. 43]

Q. -- since 1955 with Chrysler?

A. Yes, sir.

Q. When did you terminate your dealership relationship with Chrysler Motors?

A. I believe it was in May of '74.

Q. All right. Prior to that time in the 1960's, in the early '60's, beginning of that decade, were you the only Chrysler Plymouth dealer in the Birmingham area or was there any other dealership?

A. Well, there had been dealers in Bessemer, but I believe we were -- what time are you --

Q. In 1960.

A. Well, I believe I was the only Chrysler dealer in downtown Birmingham until -- I don't know, when they put Central Motors in. Was it in '61?

Q. Well, in your best judgment, do you know? When they put in Central Motors, is that correct?

A. Yes, it was the first dealer they put in.

Q. After they put in Central Motors

there was you and Central Motors, is that correct?

A. Yes. When they put Central Motors in, they put them in originally as Plymouth only. They did not give them Chrysler and Imperial. It was just when they originally opened up, they opened up with Plymouth.

[TR. 44]

Q. And subsequent to that time did they acquire Chrysler and Imperial?

A. Sir?

Q. Did they start selling Chrysler and Imperials after that?

A. At a later date, yes.

Q. All right. During 1970 through 1974 you were selling, your company was selling Chryslers and Imperials and Plymouths, correct?

A. Yes, yes.

Q. Can you tell the ladies and

gentlemen of the jury what other dealers during that time, direct dealers, were selling Chryslers, Plymouths in the Birmingham area?

A. From '70 until --

Q. '74.

A. Well, I believe it was Roebuck, Roebuck Chrysler Plymouth, Vestavia Chrysler Plymouth, and Central Motors.

Q. All right. And yourself?

A. And us, yes.

Q. Can you tell the ladies and gentlemen of the jury who were your competitors in your market in the Birmingham market area for selling Chrysler and Plymouth automobiles during that time period?

[TR. 45]

A. It would have been Roebuck Chrysler, Central Motors, Vestavia.

Q. All right. Can you tell the

jury, the ladies and gentlement of the jury a little bit or characterize the type or quality of competition in the Birmingham market?

A. Well, it was rough. It was -- ask me that question again.

Q. Well, you said it was rough?

A. Yes, sir.

Q. Can you tell us whether or not you know if customers would check out the prices of your automobiles?

A. Oh, yes.

MR. INGRAM: Wait a minute. If it please the Court, I'm going to object to does he know this and that unless he's able to give specific facts and circumstances.

THE COURT: Well, if it was based on hearsay, it would not be admissible.

Q. No, sir. Mr. Payne, I'm not asking you based on hearsay. I want to

know in the industry your knowledge of the industry. Do you know whether or not your customers checked the prices of your cars and checked prices of your competitors' cars?

[TR. 46]

A. Yes, sir.

Q. Did that happen frequently?

A. Yes, sir, because every deal, every retail deal that you make is an individual deal and the customers, the people that shop us, that shop with us, shop with the other dealers and there's many things that contributed to it. As these dealers opened up, they opened up with new modern facilities, they put Grand Opening sales on, and people that buy automobiles, even though they pre-sold through news media, if they make up their mind they're going to buy a Chrysler car, they're going to shop the

other dealers.

Q. Well, do you know of -- let me ask you one question. You mentioned something about modern facilities. How old was your building?

A. I think --

Q. How long had you been in the location that you were in during 1970 through '74?

A. We moved in in 1955.

Q. Where was that?

A. At 231 South 21st Street.

Q. All right. And during that time period 1970 through 1974 can you tell the ladies and gentlemen on the jury whether or not on any occasions of your

[TR. 47]

own personal knowledge you knew the customers would shop the prices of the different dealers that you just mentioned?

A. Oh, yes, yes, sir, because they would tell you when you were trying to trade with them.

Q. All right. Have you ever talked to --

MR. INGRAM: If it please the Court, hold it. I object to any testimony about shopping prices. That's exactly what I was getting at. He said people would tell them. That's a very vague --

THE COURT: Well, that would be inadmissible as hearsay. I sustain that objection.

Q. All right. Mr. Payne, can you tell the Court where in your opinion most of your customers came from that purchased cars from your dealership, Chrysler Plymouth, new automobiles?

A. You mean the section of town?

Q. Yes, sir.

A. I would believe that most of our customers came from the eastern section and the southern section because that's the heavier populated section.

Q. And was there or were there repeaters, or people that came back to you yearly and bought new cars from you?

A. Over a period of years, yes. We had a lot of

[TR. 48]

repeat customers.

Q. And during -- let me rephrase that. During 1970 to 1974, do you know of people that came to you, would check out your prices on new Chryslers and Plymouths and then ended up buying another car at one of the other dealers?

A. Yes, sir.

Q. You know that how, Mr. Payne?

A. From -- in dealing with the people.

Q. Did they come back for service at

your automobile facility?

A. Many of them did. Some of them did not, but some of them did.

Q. So they would buy a car at a different location and come back to you?

A. Come back to us to service the automobile, yes.

Q. Did that happen numerous times --

A. Yes, sir.

Q. -- over that four year period?

A. Yes, sir.

THE COURT: Gentlemen, I will review my ruling. I will permit testimony as to what customers told him, not for the truth of what they said, but for what they actually did tell him. You may go into that.

[TR. 49]

Q. Thank you, Judge.

Now, Mr. Payne, during this four year time period were there any incen-

tive and rebate programs that Chrysler Plymouth or Chrysler Corporation sponsored for all the dealerships in the area?

A. Yes.

Q. Can you tell the ladies and gentlemen exactly what your understanding is of those rebate programs?

A. Well, they had different kinds of programs. Some of the programs were -- you were required to buy a certain amount of automobiles to participate in the program. Some of the other programs you were on a quota basis. After you sold a certain number of automobiles, you would become eligible for the rebate. There were several of those programs and it's been several years ago, I can't recall these programs, but that was the type programs they were.

Q. Do you know who established the

quotas that you mentioned on these programs?

A. Well, the Chrysler Corporation established them, but I don't know who.

Q. Were these programs written out? Were they written in written form?

A. Yes. Yes, sir. Yes, sir.

Q. Your Honor, we would like to introduce per

[TR. 50]

our stipulation some sixteen programs that took place over this period of time.

[TR. 51]

THE COURT: They will be received in evidence as authentic with leave to substitute any omissions.

MR. REEVES: Thank you, Judge.

Q. Mr. Payne, you mentioned earlier that you had been in that location for approximately since 1955 --

A. Yes, sir.

Q. -- right before you went out of business? How old was your facility there?

A. I'm not sure, but I believe it was built in 1925 or thereabouts.

[TR. 53]

Q. Mr. Payne, what did they tell you about the ownership or renting of those buildings, the facilities for Vestavia and Roebuck?

A. Well, just in general discussion they said that they were building -- they built Roebuck first; it was under construction a long time and it was discussed from time to time and they just told me that they were building it and were going to put a dealer there.

Q. Do you know when approximately it was built?

A. Well, I don't know exactly, but

it was around '67 or '68, wasn't it?

Q. All right. Now, what about Bessemer which later moved to Vestavia, when did they move to Vestavia, do you remember?

A. Was it '70?

Q. Well, do you have a judgment?

A. It was about that time. I don't remember exactly.

Q. And was that a new or old facility?

A. It was a new facility. It was pretty much the same discussion about Vestavia that it was about Roebuck.

Q. For these ladies and gentlemen who might not be from Birmingham, could you tell them in general terms where you're located and then describe if we

[TR. 54]

can, and I will draw where you tell me to draw, describe on the board where

these other dealers were put in. If we assume that this is the Birmingham city limits --

A. Well, you're going east would be Roebuck.

Q. This would be north right here. No, that's west. I'm sorry. East would be Roebuck, right?

A. Yes, sir.

Q. All right.

A. South would be Vestavia.

Q. O.K.

A. And west would be Central Motors.

Q. All right. Now, where are you located?

A. Well, based on the chart, I would be more or less kind of in the middle of the circle.

Q. Right here?

A. Yes. I was bottled in from all sections except the north.

Q. Can everybody see that? Let me move this over a little bit.

O.K. Now, did the Chrysler representatives that you mentioned, Sandusky and other people, tell you anything about who owned the Vestavia facility south of you?

A. Said Chrysler.

[TR. 55]

Q. Did they specify who, what corporation?

A. No, just Chrysler.

Q. All right, sir. Now, in these -- let's go back to these rebate programs a minute we were talking about. Did you participate -- did your company participate in the rebate programs that Chrysler sent out?

A. Well, we certainly didn't participate in all of them. I don't remember whether we participated maybe in one or

two or not, but we didn't participate in all of them or most of them.

Q. Were you able to -- and what was the effect of these rebate programs? Just tell the ladies and gentlemen what happened.

A. On me?

Q. On your company. What did they do?

A. Well, they had a -- we were placed in a disadvantage in a trading position and it had a demoralizing effect on my sales force. We made some deals, naturally. We had to sell some automobiles. But we would possibly have to over-allow beyond what we normally would on used cars to make a deal because in some of those cases the rebates ran from, I would believe, thirty to maybe two hundred dollars, maybe more.

[TR. 56]

MR. INGRAM: Your Honor, I'm going to object to this line of testimony. He's saying they had to overallow. He's not testified as to what other prices the other dealers were selling them for. He hasn't testified on any basis that there was any overallowance based on any sort --

THE COURT: Well, that's a conclusion.

Q. All right, sir. I'll go into it. These rebate programs, can you tell the ladies and gentlemen of the jury what happened if you got or if you qualified for the rebate program? What was the effect of that? Did you get anything from Chrysler?

A. Yes. You would get a rebate on the cars that you sold to the retail customer.

Q. All right. When you say a rebate, what happened? What was the effect of that rebate on your company's cost?

A. Well, it would lower the cost of the car.

Q. The cost of the car you purchased from Chrysler?

[TR. 62]

Q. What does a customer look for -- well, let me rephrase that question. When you were selling these automobiles did you ever have occasion to determine the price that you would charge the customer based upon what you might get back from the rebate program? Would that influence the price that you charged?

A. Would that -- the customer?

Q. No. Would it influence the price that you could charge the customer?

A. Well, yes, because on those rebate programs if I was not getting the

rebate and the other dealer was getting it, it would certainly influence it because he would be actually owning a unit cheaper than I owned it.

[TR. 65]

Q. Did you ever participate in what's known as a stock rebate on old models?

A. Yes, sir.

Q. Can you tell the ladies and gentlemen how that took place, what type of program that was?

A. At the introduction of the new models the Chrysler Corporation would give us five percent rebate on all new and unused Chrysler and Plymouth cars that we had in stock as of announcement date of the new models.

Q. All right. You didn't have to reach any sort of quota for that, did you?

A. No, sir.

Q. Mr. Payne, you have described generally to the ladies and gentlemen what these programs were like, these rebate programs that we're talking about today. Can you tell the ladies and gentlemen whether or not you have a judgment or knowledge as to whether or not it hurt your business that you could not participate in all of those programs?

A. Definitely it hurt our business when we couldn't participate.

Q. How would it hurt your business? Just explain

[TR. 66]

it if you can.

A. Well, we would be unable to make sales. We were not -- we were not in a competitive situation.

Q. How did that affect the customer that might be interested in buying a Chrysler or Plymouth automobile?

A. Well, if I understand your question, the customer would buy where he could buy at the best price.

MR. INGRAM: If it please the Court, I'm going to object again to this line of questioning. He makes these conclusions without any statement of fact to back them up. I think it's irrelevant to the issues in this case and I think it's unsupported conclusion.

THE COURT: I overrule that objection.

MR. REEVES: I'm sorry, Judge, I couldn't hear.

THE COURT: I overrule the objection.

Q. (BY MR. REEVES) Thank you, Judge.

What do you mean, Mr. Payne, when you said that you couldn't participate in the plans? I want to try to explain this as much as we can.

A. Well, I'll try to explain it as best I can. When we didn't qualify for the program, we couldn't meet the quota. All of those cars were bought from

[TR. 67]

Chrysler Corporation by all dealers at the same price. Now, the dealers that could meet their quotas and did participate in the programs were at a financial advantage because they were actually buying cars cheaper from Chrysler Corporation than we were because when they sold those cars they were rebated and in some cases it was as much as two hundred dollars. Now, I know for a fact because I was sales-minded, I talked to and I had been in business a long time, when I was a much smaller dealer, I did a lot of retail selling myself, and I knew a lot of these customers and a lot of these customers would tell me I can

buy this car at this other dealer for less money than I'm buying it from you and I was in an unfair competitive position. There was nothing I could do about it. Another thing that it did, you know, we worked salesmen on commission. They would go out and lose business based on that -- for that reason, and they would become disenchanted. It was like throwing a wet blanket over them when they would lose deal after deal after deal. It's just that simple, that those rebates put me out of a competitive, or weakened my competitive position.

Q. And when did your business close, Mr. Payne?

[TR. 68]

A. May 24th, '74.

Q. And at that time what caused the closing of the business?

A. Chrysler Credit Corporation

withdrew our line of credit.

Q. All right. Why did they withdraw it, do you know?

A. Yes, we were out of trust.

Q. When you say out of trust, what does that mean for the jury?

A. Well, we had sold some automobiles, that when we were unable to pay for them, our cash flow had stopped and had gotten to the point that we couldn't pay for them.

Q. So you just couldn't -- you didn't have enough money coming in from sales is what you're saying --

A. That's correct.

Q. -- to satisfy your credit?

A. That's correct, if I may --

Q. Well, let me, if I may -- I don't want you to volunteer anything. It might be objectionable.

A. All right.

Q. So let me ask you, Mr. Payne, if you can tell the ladies and gentlemen what caused you to not be

[TR. 69]

able to pay for the cars that you owed Chrysler Credit? What was the cause of that?

A. Well, I had -- I had run out of money. I was not able to sell enough automobiles at enough gross profit to make money. It was -- that would be the primary reason.

Q. Did the rebate program have any effect on your ability to sell at a high enough margin?

A. It should because again I was at a traded disadvantage.

Q. How did they affect you is what I want you to tell the jury? How did they affect your inability to make sales?

A. Well, they could offer them to

the public cheaper than I could.

Q. Who is they you're talking about?

A. The other dealers, the dealers who were participating in the prgrams [sic].

Q. When you're talking about in this area -- let me rephrase that. Who were your competitors again?

A. Central Motors, Vestavia and Roebuck Chrysler.

Q. So when you're referring to they in those dealers, you're talking about your competitors in Birmingham?

A. Yes, sir.

[TR. 77]

Q. (BY MR. REEVES:) Mr. Payne, yesterday you had mentioned a little bit about these rebate programs, incentive programs. Can you tell the ladies and gentlemen of the jury if fleet sales -- what a fleet sale is in the business?

A. A fleet sale is a sale of an automobile to people who qualified for wholesale price, so to speak, because they used several automobiles in their business.

Q. Were those sales made by you to different people?

A. Yes.

Q. For instance, whom would your company

[TR. 78]

sell a fleet to just as an example?

A. Well, Alabama Power Company, Southern Natural Gas, people of that type.

Q. Excuse me. I'm sorry. Go ahead.

A. Sir?

Q. I didn't mean to interrupt you. Go ahead.

A. Alabama Power Company, Southern Natural Gas, people in that type of

business.

Q. And did these rebate programs cover fleet sales?

A. No, sir. I don't remember, but there might at some time have been a fleet program with a rebate attached to it, but I don't remember of any, I don't remember any.

Q. Well, normally then they would not?

A. No, sir. No, sir, would not.

[TR. 81]

Q. I said, in your opinion, how much was the good will of the J. Truett Payne Company in 1955, when you merged?

A. I would say it would be at least twenty-five thousand dollars, because that's about what we figured LaSeuer's good will was at the time we bought them out, and we had been in business approximately the same amount of time.

[TR. 84]

Mr. Payne, the rebate programs that you have mentioned, I wonder if you could tell us -- I don't know if I asked you. I may be repeating. But if you could, tell the jury the effect those rebate programs had on your competition with the other dealers you testified that you competed with.

A. My quotas were high, and we felt for that reason or for that reason that we were unable to compete with the other dealers because we had to sell more automobiles, some cases in the purchase programs we had to purchase more automobiles, and in many cases we just wasn't in position to do it, we just didn't feel it would be a good

[TR. 85]

business to do it, and in many cases we actually couldn't do it.

Q. Did that affect the price that the ultimate purchaser in the Birmingham sales area would have to pay for a Chrysler-Plymouth automobile?

MR. INGRAM: I'm going to object to that, Your Honor. It's pure speculation without any further predicate on that question.

THE COURT: I overrule that objection.

Q. You can answer it, Mr. Payne.

A. Will you ask the question again?

Q. Will the reporter read that question back?

(The last question was read by the reporter.)

A. I would say no. I can't see where it would affect the retail customer, because the rebates in most of those programs were given to the dealer. They were not passed on to the customer.

[TR. 86]

CROSS-EXAMINATION

Q. Mr. Payne, you have talked about the fact that you went out of business, I believe, in May of 1974; is that correct?

A. Yes, sir.

Q. And I believe you said you lost your line of credit?

A. Yes, sir.

Q. And that was with Chrysler Credit Corporation?

A. Yes, sir.

Q. Mr. Payne, isn't it a fact and you've also alluded to a two hundred thousand dollar judgment by Chrysler Credit Corporation against your company; isn't that right?

[TR. 87]

A. Yes, sir.

Q. Isn't it a fact, Mr. Payne, that

the reason you went out of business and what happened was that you sold about two hundred thousand dollars worth of automobiles and didn't pay Chrysler Credit for them and that's the reason you lost your line of credit?

A. At the time that I lost my line of credit it was the reason.

Q. In other words, you were selling cars in what they call out of trust; isn't that right?

A. Yes, sir.

Q. And when that occurred, Chrysler Credit came in and in effect foreclosed on your inventory; isn't that right?

A. We assigned our inventory to Chrysler Credit.

Q. And you ended up owing them something like a hundred seventy to two hundred thousand dollars, didn't you?

A. Something like that.

Q. Now, you remember when I took your deposition, Mr. Payne, and we talked about your past history as an automobile dealer in Birmingham, and I believe you told me that you were the oldest Chrysler Plymouth dealer in the state, isn't that right?

A. Yes, sir.

[TR. 88]

Q. And didn't you tell me that you sold more cars than anybody else in the state?

A. I would believe that we sold more Chrysler and Plymouth cars than anybody.

Q. Now, that being true, when is the last time you made a profit in your company, Mr. Payne?

A. We lost money for the last four or five years that we were in business. I would say that the last time that we made a profit was before Chrysler put

these additional dealers in to share this market with us.

Q. You made a profit in 1968, didn't you, Mr. Payne?

A. I think so, yes, sir.

Q. And didn't all of those dealers go into effect prior to 1968?

A. No, sir.

Q. Who didn't?

A. Vestavia was not in.

Q. Wasn't Vestavia the same as Bessemer Chrysler, and located in Bessemer prior to 1968?

A. Yes, sir.

Q. All it did was move from Bessemer to Vestavia, is that correct?

A. No, sir. Bessemer Chrysler Plymouth was a

(TR. 89]

very small dealer and had a very small facility and did a very small business.

When they moved into Vestavia, they moved into supposedly a million dollar facility --

[TR. 90]

Q. All right. Thank you, sir. Now, you said that one of the problems you had was that Bessemer moved over to Vestavia, is that correct, and caused some of your problems?

A. Yes, sir.

Q. Of course, you had no contractual right, did you, Mr. Payne, to have an exclusive franchise in that area that covered Vestavia, did you?

A. Not at this time, no, sir.

Q. And in your mind there was nothing legally impermissible about Bessemer moving to Vestavia, was it?

A. Illegal?

Q. Yes.

A. I wouldn't know, sir.

Q. Now, when they moved over there, didn't they move over there in May of 1971?

A. It was about that time. I don't remember the exact date.

Q. Now, I'll ask you, after they moved over

[TR. 91]

there, Mr. Payne, in May of 1971, whether or not you in fact sold more automobiles in 1972 than you did in 1971?

A. I don't remember whether we did or we didn't, but I don't think the amount of automobiles that we sold would have anything particularly to do with the amount of profit we made. Due to increased competition and tougher competition, we were having to sell those cars at a smaller gross. So, certainly when Vestavia, when Chrysler opened up in Vestavia, it suddenly hampered our

business.

Q. Well, I don't understand that, Mr. Payne. I want you to explain that to me. If you are selling more cars than you were the year before with them over there in Vestavia, you're not losing any volume, how is it that that is not competitive?

A. Well, in 1969, Chrysler changed the body style of the automobiles. It wasn't a good year for Chrysler -- I'll try to answer this as best I can. The number of automobiles that you sell doesn't always determine the amount of gross, of profit that you make because the more automobiles you sell, the more it costs to handle them. We were trying desperately to reach our quotas and in many cases we had to take deals that under normal circumstances we wouldn't take

[TR. 92]

due to increased competition.

Q. Mr. Payne, I mean, are you telling me and are you telling the jury that the less cars you sell, the better off you are?

A. No, sir, I'm not telling the jury that. I'm trying to say that we were forcing business and when you force business you cannot force it at a profit, a good profit or a reasonable profit.

Q. Why were you forcing business?

A. Because I was trying to reach my objectives. I was trying to sell the automobiles. I was trying to stay in business. I was losing money and I was trying to stay in business.

Q. Well, what did that have to do with the sales incentive programs, Mr. Payne, if you were just trying to meet competition because they were selling

your customers? What's that got to do with the sales incentive program?

A. Well, on those rebate programs -- I have testified before that it gave the dealers that could participate an advantage because they owned those cars at a per unit less cost than I owned them and it put me at a disadvantage.

Q. Mr. Payne, now, I want to ask you this. I want to get to that subject matter. You've testified

[TR. 93]

that it put you in a competitive disadvantage, that you lost sales and that they were underselling you and all this sort of thing. Let me ask you this. How many sales did you lose? Do you have any record of the number of sales that you lost to another dealer because of the bonus paid those dealers under these incentive sales programs?

A. I wouldn't have any record of that, no, sir.

Q. You don't have any idea, do you?

A. I think if you would look at the -- when we started to losing money, we had been here for twenty-five years and I think that the fact that when they moved in these dealers on top of us, I think that is proof enough that that was the reason we were losing money.

Q. I'm not talking about the dealers, Mr. Payne, I'm talking about the sales incentive programs. I want to know how you know and what you have to prove that you lost sales to another Chrysler Plymouth dealer because of the bonuses paid under sales incentive programs?

A. I don't have anything specifically. That's been several years ago. I can't remember. I know this, that I was there every day in the operation of my business

and I knew daily that we were losing

[TR. 94]

business on account of that. I don't think any dealer could answer that question.

Q. That's right, I agree with you, Mr. Payne, because the only way you could answer that, isn't it a fact, is if you were to compare a sale that another dealer made and see what that individual bought it for and see what you would have sold the same car for; isn't that right?

A. I didn't understand the question.

Q. Well, the only way you'd ever be able to know about that sort of thing is to go and talk to your competing dealers and see if they took a customer and used the bonus rebate, the bonus incentive program to reduce the price of the car to the customer; isn't that right?

A. They had the rebate program, we

did not. So, I maintain that it put us at a disadvantage. I'm trying to answer these things as best I can and I won't change my mind about that.

Q. Well, let me ask you this, Mr. Payne, and I'll go back to my original question. Do you have records, do you have any concrete proof that you lost a certain sale or a certain number of sales that you otherwise would have made except for the bonus program?

[TR. 95]

A. I think it would reflect in our financial statement. That would be the only proof that I'd have.

Q. But you don't know of any specific sales? You couldn't tell me today?

A. At the moment I don't know, but I knew when it was happening when we were operating the business. I knew then because I talked to the customers, many

of them myself. My salesmen complained of losing business for that reason.

Q. Now, let me ask you this, Mr. Payne. Another thing you responded to is that your competitors, the other Chrysler Plymouth dealers were using this bonus money to reduce the cost of the automobiles, is that what you were saying, to the consumer?

A. I was saying that the rebate program reduced the cost of the automobile to the dealer. I would not know what happened after then. But my statement was that it reduced the cost per unit to the dealer that qualified for the bonus.

Q. Well, I believe it was your testimony also that it wouldn't affect the retail value of the automobile, the last thing you testified to, that it would not affect the retail value of the automobile, the resell cost of the automobile to the

consumer?

[TR. 96]

A. To the consumer? I would have no way of knowing that because I wouldn't know whether they passed that on to the consumer or whether they didn't.

Q. Well, you testified -- the last question Mr. Reeves asked you is whether or not it would have any effect on the retail sale of the automobile and you said no.

A. I wouldn't think so. I still say it would not.

Q. So, what you're saying is to the consumer or to the individual on the street the bonus program is not going to have any effect in enticing him to buy from one dealer or another?

A. I didn't say that. It might have an effect in enticing him to buy the automobile, but I don't think that

through a rebate program that anybody particularly benefitted except the dealers that were qualified for the program and the manufacturere [sic] because it helped the manufacturer move automobiles by giving rebates to those dealers who did qualify.

Q. Well, Mr. Payne, I need for you to explain to me that if the purchaser of the automobile, the retail purchaser doesn't get any benefit out of it, how is it going to affect competition? How is it

[TR. 97]

going to affect whether he buys a car from you or from somebody who qualified under one of the bonus programs if the retail price is not affected by it?

A. I don't think that the retail customer would actually know. He would know if he was getting a buy in a car at

a lower price, and if he was buying a car at a lower price, he would naturally buy it from the dealer that gave him the lowest price. That's where I say that the rebate program was unfair because it was on a unit basis.

Q. But you told me that the retail bonus was not used to reduce the price to the consumer. Now, how is that going to influence the consumer whether he buys from you or somebody else?

A. I can't answer that question, Mr. Ingram. Various advertising gimmicks are used daily to attract the customer. Now, how would the customer know whether he would profit by that or not? He thinks so because he goes in, I guess, to look at automobiles. There's programs now running where you can buy an automobile for one dollar above invoice. Now, how does the customer, you know, the

retail buyer know that he can buy that car for one dollar above invoice?

Q. Now, Mr. Payne, isn't it a fact that the

[TR. 98]

thing that really ended your business was the fact that you had a very poor used car operation?

A. No, sir.

Q. It is not?

A. No, sir.

Q. You didn't testify in that deposition that I took that the fact that your wholesale or that your line of credit on used cars was reduced is what put you out of business?

A. I tesified that my, that they reduced my line of credit on used cars and we were forced to wholesale the used cars that we could wholesale and try to retail the other automobiles. Now, that

was brought about by Chrysler Credit reducing our line of credit on used cars.

Q. Mr. Payne, on page 77 of your deposition, I want to ask you whether or not Mr. Hairston, the lawyer for Chrysler Credit Corporation, asked you these questions and whether or not you made these responses. "And in 1974, the year you closed, you owed them six hundred forty thousand dollars, in 1973 you owed them seven hundred eighty-nine thousand dollars. Is that what you mean by your credit, that your credit was curtailed? Answer: Mr. Hairston, I have never complained about my credit being curtailed

[TR. 99]

on new cars. The thing that put me out of business was when they curtailed my used car operation, and they never did --

I always had enough new cars to sell. That's not what I contend at all." Didn't you say that, Mr. Payne?

A. Yes, sir.

Q. And again on page 78 of your deposition following that dialogue we just had beginning at the bottom of 77. "Question: Well, there wasn't any real dramatic change in the amount of credit that you were actually receiving from Chrysler Credit during the time you were dealing with them, was it? Answer: On new cars? Question: On new. Answer: I don't know. Right there at the last they might have cut it some, but that is not my argument at all. It is the used cars. When they cut my used car credit, that's what murdered me." Did you say that?

A. I don't know whether I said those exact words or not, but I assume that I

did.

Q. And again on page 79 Mr. Hairston asked you this. "So, you were still maintaining the same sales level but the cost of doing business was increasing and cutting down on your profit picture; is that right? Answer: Mr. Hairston, this has come up twenty times before. The thing that murdered me was that I

[TR. 100]

would go and sell a new car and trade in a used car and because I didn't have the line of credit to put it on my used car lot, I had to take it would and wholesale it. That is what murdered me." Didn't you say that, Mr. Payne?

A. I assume that I did, yes, sir.

Q. Mr. Payne, in fact, didn't you attribute the fact that your used car operation as affected by your line of credit is what put you out of business?

A. No, sir.

Q. In other words, you didn't mean what you said in that deposition?

A. That was one of the things that caused it. The thing that put me out of business, and obvious from my financial statements, was the fact that when Chrysler Corporation built these new buildings and put in these dealers in strategic points in the heavily populated points. That's what primarily put me out of business. It's that simple.

Q. And it wasn't the sales incentive program?

A. The sales incentive program was one of the things that was involved. There was many things involved, but the rebate programs were certainly a part of it.

Q. Now, on these sales incentive programs, Mr.

[TR. 101]

Payne, are you familiar with them generally, those that you introduced into evidence?

A. Most of those programs are different. I'm familiar with them to a degree, yes, sir.

Q. And basically would it be fair to say that there are two types of programs? One had a wholesale purchase objective whereby you had to purchase a number of cars to first qualify and then you were paid on cars sold after you qualified. That's one type, is it not?

A. Yes, sir.

Q. And the other type, as I understand it, was basically a retail sales program without any wholesale purchase objective attached whereby you had some base line objective to obtain and then if you met that objective or went above

it, you received a bonus; is that correct?

A. Yes, sir.

Q. Now, as I understand it, and you tell me if I'm wrong, in order to qualify for these wholesale, what I call wholesale, retail programs where you had a wholesale purchase objective, basically what you were required to do was to purchase a given number of cars; is that correct?

A. Yes, sir.

[TR. 102]

Q. Now, isn't it a fact that in many of those programs, Mr. Payne, you did not qualify?

A. That's correct.

Q. In other words, you didn't buy the automobiles, purchase automobiles?

A. That's correct. In many of those programs we could not buy it because our

quota, our percentage that they expected us to buy was unfair, it was unreasonably high. I maintain that is the reason we could not participate in those rebate programs.

Q. You say it's unfair and unreasonably high. Do you know how they were calculated?

A. No, sir, but we were -- I know this, that we were charged with forty percent of the sales expectancy in this area and some of the dealers were down as low as twenty in those programs, and that certainly had something to do with the program.

Q. Now, the dealers you talked about that had a smaller fair share, they were younger dealers and they had been in business less time, had they not?

A. Yes, they had been in business less time.

Q. And they were located in different parts of the city. One was in the east, one was in Bessemer, until it moved to Vestavia, and one was further west toward Bessemer than you; isn't that correct?

A. Yes, sir.

[TR. 103]

Q. So y'all were located in different areas?

A. We were -- the sales areas, I assume, for all the Chrysler dealers were the same.

Q. And you were in the central downtown area, that's correct, isn't it?

A. Yes, sir.

Q. All right. And you were surrounded, there were a lot of dealers in the downtown area?

A. Yes, sir.

Q. And good, strong dealers, isn't that correct?

A. Yes, sir.

Q. Like Drennen Motor Company and Doug Willey Pontiac?

A. Yes, sir.

Q. And a number of them like that who are really strong dealers?

A. (Nodding head affirmatively.)

Q. Now I want to ask you something about your fleet sales, Mr. Payne. I believe you testified that when you sell a fleet, you get a lesser gross per unit sold, is that correct?

A. Yes, sir.

Q. All right. And I believe you also testified that as a general proposition, these fleet sales did not qualify under these sales incentive

[TR. 104]

programs?

A. Yes, sir.

Q. Mr. Payne, do you know what

percentage of your business was fleet?

A. Offhand, no, sir.

Q. What if I told you it was around twenty-four or twenty-five percent of your volume, volume of new cars sold?

A. Well, that's conceivable.

Q. And if that were true, and they didn't count toward retail sales for the sales incentive programs, wouldn't that have some affect on your earnings by the sales incentive programs?

A. I didn't understand the question.

Q. Well, if fleet sales do not qualify under these various sales incentive programs as retail sales for the purpose of payment, and your business constituted twenty-five percent fleet sales, wouldn't that have some affect on your earnings under these sales incentive programs?

A. I wouldn't think so.

Q. You say you would?

A. I would not.

Q. Why not?

A. Because the rebate programs were based

[TR. 105]

on a per unit basis, and it didn't apply to fleet.

Q. That's what I'm saying. If you sold a fleet car, and you couldn't get a bonus payment on that fleet car, that's a car you sold, you couldn't get a bonus on, isn't that right?

A. Yes, sir.

Q. And if you had a high percentage of your retail sales that were in fleet, that would have an affect on your earnings under our retail bonus program, wouldn't it?

A. I can't answer that question. I don't know.

Q. On these bonus programs, Mr. Payne, and of the number that have been introduced here into evidence, do you know on the total how you compared with the other four dealers in terms of earnings?

A. No, sir.

Q. Would it surprise you to know that you were second?

A. I didn't know that I was second, but if I had been able to compete in those bonus programs on those rebates, maybe I would have still been in business, if I was second.

Q. And, Mr. Payne, let me ask you this, on those bonus programs it's your understanding, is

[TR. 106]

it not, that anyone who qualifies at a given level receives the same amount of money per car as anyone else who

qualifies at the same level?

A. Yes, sir.

Q. No difference there?

A. No, sir.

Q. The difference is where you don't qualify at all or where you qualified at a lower level, is that correct?

A. Yes, sir.

Q. Now, on the wholesale purchase program where you're required to buy a number of cars before you could sell, you said you couldn't buy that number, you weren't able to buy them. I assume that's what you said, is that correct?

A. I don't remember the specific programs, but they could have been a number of things. We might have been up to our limit on our line of credit. We might have been overstocked with cars at the time. We didn't feel it was good business to enter into them and

for that reason we didn't. We felt that we could not afford to for one reason or the other. There was several things that would be involved there, and, you know, after all it's been several years ago, and I just can't remember

[TR. 107]

each specific program.

Q. Yes, sir, I can understand that, and I'm not asking you to do that. But basically it was an election on your part not to purchase, isn't that correct?

A. Yes, sir.

Q. Now, you say your line of credit -- I believe you testified in your deposition that I read that you always had an adequate line of credit for buying new cars, did you not?

A. Not always, but most of the time we did.

Q. And you said that your decision to

enter or not to enter one of these programs might be affected by what your inventory was, is that correct?

A. Yes, sir.

Q. And are you aware that in calculating the wholesale purchase objectives, the amount of the dealer's inventory is drawn out of the objective, what he already has on hand or in transit? Were you aware of that?

A. I didn't understand your question, Mr. Ingram.

Q. Well, you said that one of the reasons that you gave for not entering one of these wholesale purchase objective programs is that you may

[TR. 108]

have had a large inventory at the time?

A. Correct.

Q. My question is, do you know that in calculating your wholesale purchase

objective that Chrysler pulled out from that your present inventory to reduce what ordinarily would be your objective by the amount you already had in inventory? Did you know that?

A. I can't answer that question. I don't know whether -- I assume that they did, but I just don't know.

Q. Yes, sir. Now, Mr. Payne, one of your programs would come out, and isn't it factually true that one of the district managers would usually come by and explain the program to you?

A. Yes, sir.

Q. And tell you how it operated?

A. Yes, sir.

Q. I mean you had no problem understanding the programs?

A. No, sir.

Q. Now, Mr. Payne, let me ask you about -- I'll turn to another line here

that we've been discussing a little bit, and when you were talking about your value of your business and your good will,

[TR. 109]

and that sort of thing, I believe you said you purchased LaSeuer Motor Company in 1955, is that correct?

A. Yes, sir.

Q. You paid what, forty-five thousand dollars for it?

A. Yes, sir.

Q. And you are saying half of that amount to good will, is that correct?

A. Approximately.

Q. Well, what do you base that on? I mean, how do you make that division, half good will, half assets?

A. I didn't make that division. What we bought from LaSeuer Motor Company was his office equipment and his shop equipment and parts, and I figured about

half -- when I agreed to pay forty-five thousand dollars for the business, I figured that he did not have that many parts, but it was worth it for me to get the business and the rest I considered good will.

Q. Well, are you saying that what wasn't the value of the parts was simply a sum you paid him just simply to buy the business from him or was it good will or do you know or can you divide

[TR. 110]

them?

A. I'm trying to answer your question. I just didn't understand that question, Mr. Ingram.

Q. Well, what I'm asking you is, did you simply pay him forty-five thousand dollars to get and buy the business or were you really paying him for good will? I mean, was it set out that way in your

agreement?

A. No, sir. Mr. LaSeuer wanted forty-five thousand dollars for the business, and we felt that it was -- that we should buy it, and knowing or feeling that there wasn't forty-five thousand dollars worth of actual assets that we were getting, we got none of his accounts, none of his used cars or anything like that.

Q. You say feeling. Did you take an inventory? Did you do anything to determine what the actual value of the assets were?

A. Mr. Rawls, who was our business manager, handled that. It was his opinion that there wasn't enough there to compensate for the forty-five thousand dollars, but we felt that LaSeuer had a good reputation, he had been in business about the same length of time that we

had been, and we were willing to go on and buy it.

[TR. 111]

Q. And you did not continue to use LaSeuer's name in your business?

A. No, sir.

Q. All right. What did you do, just take over? Did he have a building or anything?

A. Yes, sir.

Q. He had some real property, and he had parts and equipment?

A. Yes, sir.

Q. Repair equipment and that sort of thing?

A. Yes, sir, office equipment and some shop equipment, but LaSeuer had taken it -- there had been a Chrysler dealer there before, and a lot of that equipment was old and unusable, but that's actually what happened.

Q. Now, Mr. Payne, you also testified that at that time that the value of your business in 1955 was, I believe you said, seventy-five thousand dollars, is that correct?

A. I can't testify to the exact figure, but I would say that that is reasonably correct, yes.

Q. Isnt't [sic] that what you said?

A. Yes, sir.

Q. Now, did you say that in addition to that or as a part of that, there was twenty-five thousand

[TR. 112]

dollars in good will?

A. I would say as a part of it.

Q. As a part of the seventy-five thousand dollars?

A. I can't answer that question. What I said was that I felt that we had been in business for ten years, and that

suddenly our good will -- we certainly had, in my opinion, twenty-five thousand dollars worth of good will, having been in business ten years in the same location.

Q. Did you sit down -- have you calculated the value of your business at that time? Do you have any figures or calculations that you arrived at that figure from at that time?

A. At the time that we made -- that we merged and bought out LaSeuer, was that your question?

Q. Yes, sir. Well, or at present? Have you made any calculations to derive that seventy-five thousand dollar figure?

A. I still don't understand your question, Mr. Ingram.

Q. Mr. Payne, let me simplify it for you.

A. Please do.

Q. You told me your business is worth seventy-five thousand dollars, and I want to know how you

[TR. 113]

derived that figure of seventy-five thousand dollars. I want to see where you sat down and added up things and came up with the severnty-five [sic] thousand dollars.

A. At what time, Mr. Ingram? Which business are you talking about, at the time we merged with LaSeuer or at the time I went out of business?

Q. I'm talking about at the time you merged with LaSeuer.

A. Well, certainly we had records to substantiate it at the time. Now, that's been twenty years ago.

Q. Yes, sir, that's what concerns me. You are now saying twenty years later it was worth seventy-five thousand

dollars, but you don't tell me the basis of the seventy-five thousand dollars. That's what I want to know. Where are your calculations to show that it was the value of seventy-five thousand dollars or is that just some figure you picked up out of the air?

A. Mr. Ingram, it would be absolutely impossible for me to go back twenty years and tell you exactly what I remember at the time, that when we made the transfer we borrowed the forty-five thousand dollars from CIT Corporation to buy out LaSeuer, and we had to furnish them with a reasonable financial

[TR. 114]

statement to be able to borrow the money.

Q. Mr. Payne, I'm talking about the seventy-five thousand dollars that you said your business was worth. Now, I don't know whether you're talking about

your business combined with LaSeuer or your business before you bought LaSeuer.

A. I'm talking about our business before we bought LaSeuer out, because CIT Corporation loaned -- made us a capital loan to buy out LaSeuer Motor Company, and it was a forty-five thousand dollar loan, and it's reasonable to believe, and I would believe that the business certainly was worth that or CIT wouldn't have loaned us the money.

Q. Well, you testified it was worth seventy-five thousand dollars?

A. I still testify that I think it was worth seventy-five thousand at least.

Q. But you can't tell me how you got the seventy-five thousand dollars, I guess is what you're saying?

A. Mr. Ingram, again this was twenty years ago. I would have no way of -- my memory is not that good. I can't

remember exactly what the assets were at that time. I would believe that it could have been worth even more money than that, but I

[TR. 115]

would believe or would have to believe that it was worth at least that much or CIT would not have made us a capital loan to buy out LaSeuer.

Q. But you don't have any present books and records to reflect that?

A. No, sir, I do not. No, sir, I do not.

Q. And it's just your best opinion, I suppose?

A. Yes, sir.

Q. All right. I just want to ask you a question. I may not have understood. But when was your present facility built?

A. I'm not sure, but I believe it was 1925.

Q. '25?

A. Or it could have been 1935. I'm not sure. I wouldn't know.

Q. Now, when you went out of business in 1974, Mr. Payne, I believe you valued the present value of your property at fifty to seventy thousand dollars or the value of the business at that time?

A. Yes, sir.

Q. Now, I'm going to go through the same thing we did on the seventy-five thousand dollars. I want you to tell me how you got fifty to seventy thousand dollars?

A. Well, at the time we went out of business

[TR. 116]

after we had turned over our inventory to Chrysler Credit, we had some office equipment, some other equipment and I would -- we were there -- we had been

in business for thirty years. It was actual -- actually it was a going concern. We had not -- the company -- the corporation was still in existence, and I feel that the good will alone would have been worth seventy-five -- fifty to seventy-five thousand dollars.

Q. Well, now, you say the good will alone. Let me ask you if you took this into consideration in figuring that, Mr. Payne: Now, here you had a business that hadn't made a profit since 1969; here you had a business that didn't even own the building they were in, and the building was built in 1925 or 1935, and leased, and isn't it a fact that your Chrysler franchise agreement says you can't sell your franchise without the written consent of Chrysler?

A. That's correct.

Q. Did you take all of that into

consideration in arriving at that figure, Mr. Payne?

A. Yes, sir, I took it all into consideration, because a lot of people would like to have a downtown or Chrysler dealership, and I would believe

[TR. 117]

that that would be more than a fair price as far as good will is concerned for a company that had been in business thirty years.

Q. And hasn't made a profit in the last five or six years?

A. That's correct, sir. We made profit from time to time. Other businesses, other automobile dealerships right in the City of Birmingham have gone for periods of time without making a profit. Maybe if we had been able to participate in those rebate programs, maybe we would have had a better flow of

cash and could have made a profit instead of having a long losing streak.

Q. And maybe if you had had a better used car business, you would have stayed in business, isn't that right?

A. And I'm not trying to get into a discussion with you, Mr. Ingram. Basically I believe and I cannot change my mind that the fact that Chrysler Corporation came in and put dealers all over me in new buildings, that participated in the same occupation that I was participating in, that I can't help but believe that that is what put me out of business. I will die believing it, because that is the primary reason. I did all right for twenty-five years without

[TR. 118]

that competition.

[TR. 123]

REDIRECT EXAMINATION

[TR. 124]

Q. Okay. You also mentioned on your examination with Mr. Ingram that there was tough competition in this area, and that you were having to sell at a smaller gross profit in order to compete?

A. Tjat's [sic] correct.

Q. Could you in many cases meet the low price that the other dealers, Chrysler-Plymouth dealers were offering?

A. No, sir.

[TR. 125]

Q. Was this during the rebate programs that we're talking about?

A. Yes, sir.

Q. Did those rebate programs -- I think you have said -- let me rephrase it.

I think you have said those

rebate programs affected the cost per unit?

A. They did.

Q. Now, if you had a higher cost per unit because you didn't participate in the rebate program, and another dealer here did participate in it, and had a lower price per unit, then would that affect the price at which you could offer the car for sale to the public?

A. Yes, sir.

Q. So it would affect the price of the car to the public, is that correct?

A. It could, yes, sir.

Q. Okay. Can you lean back a little, Mr. Payne. There you go. You were breathing in the microphone. That's all right.

Mr. Payne, do you know how many cars you sold, your corporation sold in 1970? Would that be or would that be

reflected on some document somewhere?

[TR. 126]

A. It would be reflected on a financial statement.

Q. You're talking about the dealer financial statement?

A. Yes, sir.

Q. Do you know whether or not or did you ever discuss with Chrysler Corporation whether or not in 1970 your sales for the Birmingham area amounted to forty percent of the business in this area, in other words, what they said was your fair share?

A. Well, now, that was my fair share, according to Chrysler Corporation. We discussed it from time to time, yes, sir.

Q. That's because you never did -- you could not ever get to that fair share?

A. That's correct.

Q. During these rebate programs you told Mr. Ingram that you didn't have any specific data on each sale that your company lost. Can you tell us how you know that your company lost sales because of the rebate program?

A. Well, your customers would come into your showroom, and you would lose the business there. You knew they bought Chrysler automobiles, because it would be shown in your registration sheet, and

[TR. 127]

they would tell you, "I could buy this car over here for less than I can buy it from you, and I'm going to buy it over there," and in many cases some of our customers that we had had for years bought and then came back to us to service the automobiles for them, even for the free service.

[TR. 134]

GEORGE IGNATIN

[TR. 137]

Q. Can you tell the ladies and gentlemen of the jury just briefly what types of programs and what are the effects and what happens when a dealer

[TR. 138]

participates in those programs in Birmingham?

A. It's my understanding that this is a fairly normal procedure in the automobile industry, at least it is for Chrysler. They have a regular means of rebating monies to the dealership. These are bonus programs, quota programs set up in which each of the dealers is given some kind of a planning potential or a fair share and if they meet or exceed that, depending on which program, they then get certain monies back from

Chrysler. Now, the effect of this is to reduce the cost of the car to the dealers per unit. The money is paid by Chrysler in almost all of these programs on the number of cars that these dealers sell to final consumers. The dealers pay Chrysler an equal amount for the cars and then the effect of this, or of all these programs, then, is to reduce the cost to the dealer of the cars that the dealer buys from Chrysler.

Q. Can you tell the ladies and gentlemen if there is a purchase objective in most of these programs, and tell them what that means.

A. In a couple of programs, not most of them as I recall, there was what we call a wholesale purchase objective as well as a retail objective. Now, the purchase objective refers to the dealer's

[TR. 139]

purchases from Chrysler. The retail objective refers to the number of cars the dealer sells to ultimate consumers. Now, as I say, in a couple of these programs, not a majority of them, the dealers have to purchase a certain number of cars from Chrysler before they qualify for the rebates which are based on the sales made to the ultimate consumers.

Q. So, the monies paid are based on the sales for the most part; is that correct?

A. Yes. The monies in all cases except, I think, two where there was a floor plan involved, and it's not clear whether that's a purchase or retail, but in all the cases other than that, the actual rebate or discount on cost was paid on retail sales by the

dealership to consumers.

[TR. 191]

Q. Do you have a total figure, Dr. Ignatin, for the amounts of rebates that you have figured on your chart in the last column, the charts, excuse me, that we were going over a little while ago that shows the total difference over the four year span for J. Truett Payne Company?

A. Yes. The total difference between what -- you mean between what J. Truett Payne would have received if they had not been discriminated against?

Q. Right.

A. My figure is eighty-one thousand two hundred forty-eight dollars and ninety-four cents.

[TR. 202]

Q. Now, based on your knowledge and the fact that you have been teaching and

dealing in competition and the effects that price differences have on competition in a given market, can you tell the ladies and gentlemen of the jury your opinion of the effect that these programs that you've charted for us have on competition in the Birmingham market?

MR. FORMAN: Your Honor, I would object to that on the grounds he shows no knowledge of the automobile market, that he's made any studies in the automobile market.

THE COURT: I overrule. His opinion, the credibility of it is for the jury.

A. This is, of course, in the form of some degree of speculation. But we do go back to economic theory and see what we would predict would happen from this kind of a situation. The cost difference to Payne means that they're paying Chrysler

more per unit than the other dealers. Now, they have to compete with these other dealers and they have to compete although they're paying higher costs to Chrysler for the cars. Now, this has a two-pronged

[TR. 203]

effect on competition which we would look for. First, it makes Payne less able to compete in the selling of cars. It's normal business procedure and it's well known that the salesman discounts off of list price, and the ability of the sales[man] to discount off of list price clearly will be related to the cost of the dealership to the automobile company. So, if you have two companies competing with each other and one has a higher cost than the other, the ability of the one company to compete is less than the other. Now, not only does

this impair Payne's ability to compete with the other company, it also hurts competition in the sense that the company enjoying the price discrimination is insulated from competitive forces and does not itself have to compete vigorously, which is to say, they're isolated from the competition that would have resulted from Payne if Payne had gotten the equally low price or the equally high rebate. So, Roebuck or Central, which in most of these cases were the ones who received the benefits of these price discriminations, were insulated from having to compete as vigorously with Payne as they otherwise would have had to.

Q. What effect does that have on the price of a given product to the ultimate consumer?

[TR. 204]

A. Well, the predicted effect is that

these other companies not having to compete as hard and Payne not being able to compete because of this price discrimination, the predicted effect is that the price that the ultimate consumer would pay for the goods would be slightly higher.

Q. Have I asked you, Dr. Ignatin, to determine from the dealer financial statements of the J. Truett Payne Company as best you could the different cash flows and revenues over a given period of time?

A. Yes, I did look at that.

Q. Have you examined the volume of sales over a period of time from 1967 through 1974 for J. Truett Payne Company?

A. Yes, I have.

Q. Where did you get all this information?

A. From the financial statements.

Q. Dealer financial statements?

A. Dealer financial statements, yes.

Q. And have you made an attempt -- let me rephrase that question. In the studies and courses that you are teaching at the University of Alabama and elsewhere, does the study of economics get involved with or do you determine the going value or the market value of a going concern in a market,

[TR. 205]

business of selling products in a given market?

A. Yes, this is a standard question in many economics courses and finance courses, the valuation of a business, yes.

Q. And have you made an attempt to make an evaluation or give your opinion as to the market value of J. Truett Payne Company as of May 28, 1974, when it

went out of business?

A. Yes, I have made two attempts. I have used two methods.

Q. When you say two attempts, you mean you took two different approaches?

A. Yes, two different methods.

Q. Could you tell the ladies and gentlemen of the jury your opinion as to the value of the going concern of J. Truett Payne Company on May 28, 1974?

A. O.K.

MR. FORMAN: Your Honor, we'd object to that until he lays an adequate predicate of what he did.

THE COURT: I overrule the objection.

Q. You may answer.

A. First let me say the problem involved is to figure out what J. Truett Payne would have been worth in May of 1974 as a going concern if they had not

suffered the price discrimination which I have

[TR. 206]

estimated cost them approximately eighty-one thousand dollars over the previous four years. Now, J. Truett Payne lost money in each of those four years and they would have lost eighty-one thousand dollars less than that if they hadn't been discriminated against. So, the question, then, for me to figure out is how much was that business worth as of May, 1974, if they had not been discriminated against in these programs, which is to say, had eighty-one thousand dollars more than they actually did. Now, I used two methods. The one method is a very simple method which I used just to get a ballpark estimate to see if I'm going to come to somewhere in the right place to it. For that I went back to

what the business was worth back in 1955 when it opened in the location it was in in 1974. From conversations with Mr. Payne, he told me that he bought out Leseur in 1955 for forty-five thousand dollars and he estimated that of that purchase price, about twenty-two thousand five hundred dollars was goodwill. Now, goodwill refers to the value of the business beyond its physical assets. This refers to the value of customers and the good name of the business. Well, at the time that J. Truett Payne bought Leseur in 1955, he merged his own business, which it was itself

[TR. 207]

a going concern into the business, or he actually did it the other way, he merged Leseur into his business at a new location, and from conversations with Mr. Payne he said that his business was worth

about a hundred thousand dollars at the time. He was not clear as to what the goodwill of his business was worth.

Q. Let me give you an assumption or a hypothetical to take into account in your answer, Doctor, that assuming that J. Truett Payne has stated or testified that his goodwill at that time was approximately twenty-five thousand dollars. Could you make an opinion, give your opinion as to the goodwill of the company as of May 28, '74?

A. He declared in court that it was twenty-five thousand dollars?

Q. Yes. I want you to assume that.

A. Now, the estimates I had made the other day which I gave to the other attorneys was that I assumed about a thirty thousand dollar goodwill involved for Mr. Payne's business based on what he had paid for Leseur's goodwill and if

his evaluation of his company was a hundred thousand dollars, that it would be worth somewhere around thirty thousand dollars. I started on the assumption that his

[TR. 208]

goodwill in 1955 was fifty-two thousand five hundred dollars. Now, you're saying that it would be, that his part was only twenty-five thousand. That would reduce it to forty-seven thousand five hundred dollars, the goodwill in 1955.

Q. Right. Do you need a calculator, Doctor?

A. I think I might be able to do this by hand.

Q. I apologize.

A. It looks like about a twelve thousand dollar difference.

Q. What is your opinion as to the market value of the going concern as of

May 28, '74?

A. Now, using this first method, I used a figure of about a four percent growth in the value of that firm per year for each of those twenty years. Now, the method I used was to use a combination of interest rates and rates of inflation. Economists use both methods. It usually depends on which one is higher and what they're interest in seeing. I don't feel particularly strong about either method. They're both good methods. They're both accepted methods in the profession. I'm not prepared to argue that one method is superior to the other. I prefer using both. So, I used four percent, which is just a rough average of the inflationary and the prime interest

[TR. 209]

rate over that twenty year period.

Interest rates tended to be a little higher than that and inflation tended to be a little lower than that four percent. My figures indicated that with my original estimate of fifty-two thousand five hundred as the going concern value in 1955, that the firm in 1974 would be worth about a hundred fifteen thousand dollars. Given what you just said that Mr. Payne testified, if the firm started out at forty-seven thousand five hundred dollars, that would mean and this is a guess, I think I need a calculator, you can use one if you want, but it's going to be slightly over a hundred thousand dollars. I don't know if you need precision on this anyway.

Q. Is that a common and standard method in your profession as to make adjustment of a value of the goodwill of a company over a period of years?

A. Yes. It's not the preferred method, but it is one other method if you have no other way and it is good to give you some idea of what kind of estimate you're coming up with to check your figures to see if things are happening. Obviously the value of Payne's business could have grown more or less than this four percent average per year over the twenty years. A better method is the second method which

[TR. 210]

I used, and this was an attempt to estimate how much money J. Truett Payne would have earned or lost in each of the four years after it went out of business.

Q. The second method is also a standard method in your profession in determining goodwill and value of a going concern?

A. Yes.

Q. O.K.

A. Now, in 1974, Payne lost twenty-two thousand three hundred thirty-five dollars in the four months it was in business. However, I also determined that in 1974 they lost sixteen thousand and thirty dollars due to price discrimination in these rebate and bonus programs, which means that in 1974 Payne would have lost a little over six thousand dollars if it had not suffered price discrimination in these programs. Now, they were in business for four months. I took that figure of about sixty-three hundred and five dollars and I multiplied that by three, and that came to nineteen thousand dollars and I raised it to twenty because it's easier to work with and I said let's assume that Payne would have lost twenty thousand dollars during 1974 if they had been in

business the entire year and had not been subject to these discriminatory rebates. All right. 1974 was

[TR. 211]

a very bad year in the American automobile industry. This was the year following the Arab oil boycott, the embargo on oil sales, the extremely rapid increase in the price of all forms of energy and the overall inflation in the country. In addition, gross national products, the total dollar value of goods and services sold in this country in real terms fell in 1974. So, it was a very bad year for the whole economy and it was particularly bad for the automobile industry. Now, in 1975, what would Payne have done? Well, I related 1975 to '74. '75 was a bad year for the American automobile industry, but not as bad as 1974, although Chrysler had their worst year in their history in

1975. This was a disaster year for Chrysler, in large part, however, due to overseas operations. Now, what I figured was that given the fact that '74 was such a bad year with inflation, with the rising price of gas, with Chrysler being caught perhaps with the wrong models or whatever, but in real bad shape, that if Payne would have lost twenty thousand dollars in 1974, he probably would have lost around ten thousand dollars in 1975. Now, that ten thousand dollars loss in 1975 needs to be refigured back as to its discounted value in 1974.

[TR. 212]

Q. Is that because -- can you tell the ladies and gentlemen why?

A. As I understand it, what I'm trying to do here is figure out how much the firm was worth in 1974 and so

losses suffered in 1975 need to be discounted either by the rate of inflation or the interest rate to figure out how much the value in 1974 of these losses in 1975 were.

Q. Okay.

A. Again we're trying to figure out what the value in 1974 was for losses or gains in years after 1974. I used a six percent discount figure. Now, here again we have three different figures. We can use the rate of inflation [sic], we can use the prime rate of interest or the legal rate, and the legal rate is six percent. That has never appealed very much to economists except coincidentally. We've always preferred primary or the rate of increase in the Consumer Price Index. The reason I use six percent is because that is a better figure for later years and it's

actually over -- this understates the value of Payne's business, if I use that lower figure in 1975.

Q. So this would be a conservative result?

A. Yes, this is a conservative figure, and

[TR. 213]

I wanted to do it for consistency. Instead of using like a nine percent in '75, and then a six percent figure in '76, I figured I would just use a six percent figure for both years, even though this reduces the value of Payne's business slightly. It's not enough to make a big difference, though.

Okay. For 1976, what would have happened? Well, 1976 was a banner year, this was the best year in Chrysler's history, this was the best year in the American automobile history. General

Motors made the largest profit they had ever made. Chrysler made the largest profist [sic] they had ever made. American Motors made the largest profit they had ever made.

To see how well J. Truett Payne would have done in 1976, if they could have stayed in business, and I think they could have stayed in business because as I said, they suffered $81,000.00 worth of discrimination, and their losses in '74 and '75 would have only been $30,000.00, so I then went back to see what J. Truett Payne's best year was, and coincidentally J. Truett Payne's best year also was the best year that Chrysler had ever had prior to 1976, so the Chrysler Corporation's best year prior to 1976 was 1968. J. Truett Payne's best year was 1968.

[TR. 214]

In 1968 J. Truett Payne made $36,000 some odd dollars, a little more than $36,000.00. Now, how much would that $36,000.00 that Payne made in 1968 have been in 1976, recognizing inflation, the growth of the economy, growth in the Birmingham area, et cetera? Well, the method I used again was a conservative method. I decided to use the increase in profits that Chrysler itself came up with between those two years.

Now, Chrysler made approximately 33 percent more in 1976 than Chrysler made in 1968. It seemed to me then very reasonable to say that Payne would have made about 33 percent more in 1976 than it would have made -- than they made in '68. So they made a little more than $36,000.00. I think the exact figure was $36,800.00 that they made in 1968.

I increased that by one-third, and I came out to a round $50,000.00 is what Payne would have made in 1976, if they could have stayed in business until last year, and of course that has to be discounted and when I discount that at a six percent rate for two years, that is a present value in 1974 of $44,500.00.

Now, the question is, what would Payne have done in 1977? Well, '77 is a good year for automobiles, it's a better year for Ford and General Motors than it is for Chrysler. Now, remember Chrysler

[TR. 215]

had the best year in its history in 1976. This year they are not doing quite as well. I believe their sales were off about twelve percent as opposed to last year. So I figured that Payne's profits and sales probably would have fallen off for 1977, and so I estimated that

although 1977 will be a good year, and all of the signs are favorable, that the economy is starting to pick up even after the bad winter, that Payne still would have made at least $20,000.00 this year, and when this was discounted back to 1974 values that comes out to $16,792.00 using six percent discount figure.

By the way, I said the economists don't usually like the legal six percent figure. We've got a very nice coincidental situation today. The rate of inflation is about six percent, the prime rate on interest is six percent, and the legal rate is six percent today, so it's one of those happy coincidences in history when they all come together to use the same discounting figure, and there is some reason to believe that this will stay that way over the next six to eight

months.

Okay. For 1978, again we are trying to figure out what's going to happen. I suspect that '78 will be about as good a year as 1977. There

[TR. 216]

will be changes in the American automobile market, no doubt, but basically in terms of predictions of what happens to Gross National Product, the rates of inflation, et cetera, '78 looks like it ought to be a slightly better year than 1977. Looks like it will be --

MR. FORMAN: Your Honor, I'm going to object to him going any further. This is pure speculation. He even said he just suspects this.

THE COURT: I sustain with respect to '78.

Q. All right. Dr. Ignatin, then based on up through your judgment in '77

as to the performance that J. Truett Payne Company would have had, had it stayed in business, can you give us your opinion as to the value of the company as far as its value as a going concern in 1974, when it went out of business?

A. Okay. Up through 1977, I can add that, it comes out to about $32,000.00 in additional value which is to say $32,000.00 would be the discounted value in 1974 of the earnings from 1974 through 1977 that Payne would have earned if they had not been subject to this discriminatory bonus and rebate program, and if they had stayed in business through 1977, so that was $32,000 -- approximately $32,000.00

[TR. 217]

I think it comes out to $31,858.00.

Q. All right. What's the --

A. Well, that's not precise. That's more precise than -- somewhere around $32,000.00.

Q. All right. Now --

A. Now, in addition to that, however, if the firm had stayed through 1977, it would have been a going concern, and it would have had a value in 1977. This would have a value to someone who would purchase the business.

MR. FORMAN: I object to this. He's already trying to recover future earnings, and now he's going to try to capitalize future earnings at some arbitrary date.

THE COURT: Overrule the objection.

Q. I'm interested right now in getting your value as to your opinion in 1974. I think you're getting to it. I just want the value and then we can talk about how you got it.

A. I wanted to go back on that. What I'm trying to do again is see how much Payne would have earned or lost over those next four years, and then the question is, what would the value of that firm have been in 1977, and then try and discount that back to 1974 values.

[TR. 218]

Q. Okay.

A. So the question is, how much would this firm be worth in 1977 to a prospective buyer in the Birmingham market who wanted to go into business and take over a going concern which is now profitable and faced with non-discriminatory rebates and bonus programs, and what I was assuming then was about a $20,000.00 a year net profit, that how much is the firm worth that's makeing [sic] about $20,000.00 a year, and the answer is we use a discount figure of ten percent, a

conservative figure, and say that the capitalized value of that firm in 1977 would have been $200,000.00. That's what a prospective buyer would be willing to pay to get an income stream of $20,000.00 a year.

Q. And then you discount that figure of $200,000.00 back to 1974 dollars?

A. Discount that figure back into 1974 dollars. Now, again I did the figure of 1978, $200,000.00 in 1978, at a six percent rate of discount would discount to a value of $158,400.00 in 1974. If we discount it back from 1977, the value of that firm would have been about $170,000.00, and I don't have it exactly because --

Q. Well, your best judgment.

[TR. 219]

A. -- my calculator battery went dead.

Q. Your best judgment is what we are interested in. Approximately $170,000.00?

A. Yes.

Q. Do you take into account at that time -- you said the value as a goind [sic] concern would be $170,000.00?

A. Yes.

Q. Do you take into account the losses during --

A. Yes.

Q. -- this time?

A. We take into account the losses and the gains which would have netted out to a plus $32,000.00.

Q. Oh, I see. The $32,000.00 figure is taking into account the losses over the past five years, and the gains over the next three?

A. Correct.

Q. Okay. So that's your figure then, $170,000.00?

A. He had $32,000.00 worth of net earnings which offset the losses or the total would be $32,000.00 in 1974 dollars plus an additional $170,000.00, and since these are just rough figures because of my calculator problem, what I'm saying is that this method says that the value of Payne's business in 1974 when he went out of business was right around

[TR. 220]

$200,000.00. Now, the first method gave me $100,000.00 That was $170,000.00 plus the 32.

Q. Oh, I'm sorry.

A. So it should be about $200,000.00. So these are the two methods. As I say, I prefer the second method. I think it's a more reasonable figure.

Q. Do you think that this method that I am writing on the board now is the more

reasonable method?

A. Yes, that is a more reasonable method, because it's not based on this constant gain of value over the twenty year period between 1955 and 1974.

Q. Now, I want to ask you, you've been through the methodology and how economists value companies. Is that standard in normal practice to value companies in that method, by that method?

A. Yes.

Q. And accepted in the practice of your field?

A. Yes.

Q. I'm sorry, you'll have to speak up.

A. Oh, yes. Yes, yes, it is.

Q. All right, sir.

MR. FORMAN: Your Honor, I would like to

[TR. 221]

move to strike all of this testimony concerning the going value of the concern either on the first method or the second method. It's all based on speculation. It's one assumption after another. There is no relation of that to the Birmingham market, and he says Chrysler may have had a good year. He doesn't say whether the Birmingham market is a good market for Chrysler or a poor market for Chrysler. He in no way relates anything back to what was happening here in Birmingham.

THE COURT: Overruled.

[TR. 222]

Q. Just one moment, Judge, I think I'm about through.

Doctor, in your opinion as an economist, did these rebate programs that you've studied have a good or an adverse effect on competition between

the four dealers, four Chrysler-Plymouth dealers in those years?

A. Oh, I think it reduced competition. I think it was an injury to competition. As I said before, it had a two-pronged effect. It reduced Payne's ability to compete, and by reducing Payne's ability to compete, it reduced the need for these other companies to compete as vigorously. So it reduced the vigor of competition in the Birmingham market for Chryslers and Plymouths.

Q. Thank you. Judge, at this time I would like to offer into evidence the exhibits that we have used as summaries of those programs which we had previously offered. We identified them all in Dr. Ignatin's testimony.

THE COURT: All right.

MR. FORMAN: Your Honor, we would

to object to those, these been no showing, not even a basic showing that those dealers are actually in competition, no showing by this expert that he's

[TR. 223]

made any study along that line.

THE COURT: Overrule the objection.

CROSS EXAMINATION

[TR. 228]

Q. Dr. Ignatin, is it a fair statement of your testimony that the programs in which you have concluded that there is some discrimination, results in some discrimination of price, are the programs where you have basically taken the amount of money which, say, J. Truett Payne Company made, divided the number of cars that he sold during the time of that program into that figure, and come up with a payment per unit, and when that payment

per unit differs, you have considered that to be discrimination?

A. Yes. Again, what I did is, I took the amount of rebate on each car line group that J. Truett Payne received, and I divided that by the number of cars that Payne sold, and that gave me the rebate per unit that Payne got on that car line group.

I then went to the other dealers and took the amount of rebates they got for each car line group, and divided that by the number of cars sold in each car line group, and where there was a difference, I would then take the difference in per unit rebate that the other dealers got, and subtracted what Payne got on a rebate per unit, and I multiplied that by the number of cars sold

[TR. 229]

by Payne, and that was the difference

between the two, or what I would call the difference due to the discrimination, yes.

Q. Okay. The difference in payment, and you said that was the discrimination?

A. Yes. There was a difference per unit in the payment Chrysler made to the dealers.

[TR. 255]

Q. Dr. Ignatin, I believe you've testified on your direct examination that you felt these sales incentive programs had an adverse effect on competition, one, in a sense, because J. Truett Payne's salesmen could not, as you say, discount, could not discount the price of the cars?

A. As much as --

Q. As much as the other dealers?

A. Uh huh.

Q. And because you say the other

dealers are insulated from competition?

A. Yes, because J. Truett Payne could not discount their cars as much as they otherwise could have. This meant that the other firms did not have to discount their cars as much as they would have had to.

Q. You say the effect of this would be, the price that the ultimate consumer would have to pay might be slightly higher?

A. Yes.

Q. Let me ask you this: do you have any evidence that the other car dealers discounted their cars more than J. Truett Payne Company did during the period '71 through him going out of

[TR. 256]

business, the date he went out of business on May 28th, 1974?

A. No, I did not compute that.

Q. Let me ask you this: if the other dealers took the incentive money and simply ran it through the corporation into their pocket, the pocket of the principal stockholders, what effect would that have on J. Truett Payne Company?

A. Well, the fact that Payne did not get the money to run through to its stockholders, of course, injured Payne, but their ability --

Q. It injured the stockholders?

A. Yeah. It would injure the stockholders of the Payne corporation, if they didn't have that money to run through. But it would also reduce the ability of the Payne people to compete.

I'm not too sure exactly how you just run that money through. This rebate is, in fact, a reduction in the cost of the car that Chrysler is getting from these dealers.

[TR. 257]

A. The point that I am trying to make is that exactly what these firms do with it is not at all clear. The effect as it hits Payne, however, is that they get a lessened ability to compete.

Q. I don't understand how they have a less ability. Let's just say the dealer pays all the -- let's say Roebuck --

A. Uh huh.

Q. -- receives more incentive money, all of his incentive money is paid to his salesman as, say, a commission.

A. Uh huh.

Q. The price that they are selling the car for may not be lowered. How is that going to have an adverse effect on J. Truett Payne Company?

A. Well, in that case, if they didn't lower the price -- of course, the

salesman can lower the price. The ultimate deal is worked out between the salesman, the sales manager and the customer,

[TR. 258]

and the salesman in selling the car, since he's getting more for the car, will try harder, and one of the methods salesman have in the automobile industry of trying harder is to reduce the amount of commission they make on the car.

A typical salesman might figure if he sells the car for $5,000 he will make $500, this is just hypothetical. If he knocks the price down to forty-eight hundred dollars he might make only $400. Well, he might just want to do that. And with this extra money coming in, of course, he's got the ability to do that and compete, whereas, the Payne salesman and the Payne Company does not.

Q. But in effect if the other company did not lower their price, the J. Truett Payne Company is not going to be adversely affected by competition, isn't that a fact?

A. Well, if both companies charge the same price, then the gross profit would be different per car. And, yes, it would hurt Payne. They would be getting less per car than the other company would by the amount of that difference in rebate.

[TR. 260]

Q. Doctor, when you gave us your calculations of the goodwill of J. Truett Payne Company as of May 28, 1974, you used two methods?

A. Right.

[TR. 261]

Q. The first method, in effect, you discounted -- well, let's go through that.

A. O.K.

Q. In the first method, you attempted to determine the goodwill of J. Truett Payne Company after the merger between J. Truett Payne Company and Leseur which occurred in 1955?

A. Right.

Q. And you said that Leseur, in talking to Mr. Payne, you decided that Leseur had twenty-two thousand five hundred dollars of goodwill?

A. Correct.

Q. Did you see any books or anything to verify this determination?

A. No.

Q. You say you also had to take Mr. Payne, Mr. Payne's statement that the goodwill value of his business was twenty-five thousand dollars?

A. I took that in court. I had determined from my own conversations

with Mr. Payne that his goodwill was on the order of thirty thousand dollars.

Q. How did you determine that?

A. That was based on his estimate that his firm was worth about a hundred thousand dollars, that when he had merged Leseur into his company or his firm

[TR. 262]

into Leseur, whichever way it went, that his firm was worth about twice as much as Leseur's and that he had paid about twenty-two thousand five hundred for the goodwill of Leseur. So, I had estimated that Payne had around thirty thousand dollars worth of goodwill in his own business at the time of the merger. Now, I understand that in court Mr. Payne had said about twenty-five thousand dollars. So, that was about a five thousand dollar difference between the estimate I had made and what Mr. Payne himself said in

court.

Q. You never made any independent study of any records to verify that Mr. Payne's company may be worth twenty-five thousand dollars, did you?

A. No, I did not.

Q. So, what you did, you then totaled the twenty-five thousand and the twenty-two thousand five hundred and came to a figure of forty-seven thousand five hundred dollars which was goodwill value of the merged company in 1955?

A. Yes, as an estimate, as a bench mark, as a bench mark to check on the other method which I find preferable.

[TR. 264]

Q. Let me ask you this. When the companies were merged, the name of Leseur was dropped, was it not?

A. Yes.

Q. Don't you believe that would

eliminate some of the goodwill, if not a large portion of the goodwill attached to that company?

A. It might. It would depend on exactly how the merger was done, the advertising campaign at the time. As I understand it, Mr. Payne took over the Leseur Agency and the location. So, there would be some -- there's a trade-off in there also that -- goodwill isn't based on the name in the sense of the name. When we use the term name, we're talking about the reputation of the dealer, and the question would be did Payne then acquire the reputation of Leseur when he acquired the company and the location.

Q. You have no way of estimating that, do you?

A. Well, from what he said he paid for it. Whether he got it was another

story.

Q. Whether it disappeared after he took over would be a different story?

A. It might and it might not. We don't assume that it disappears just because he took over. He paid for it. He assumed it and then he started

[TR. 265]

dealing. Whether it disappeared, I don't know.

Q. Well, after you made this initial assumption that it was forty-seven thousand five hundred dollars as the goodwill, and that's what it is, an assumption, you then took a discount figure of four percent?

A. Yes. It's not a discount figure in this case. I increased the value by four percent per year for the next twenty years until 1974.

Q. And that was based on an

inflation rate and the interest rate?

A. Yes, a combination of the two, a rough average of the two.

Q. Did you take into any consideration in arriving at the four percent figure the automobile market during that period, whether it was good or bad, its ups and downs?

A. Well, this is one of the reasons why I don't think this method is all that good and why I used it as a bench mark. The market went up and down over the years. He had some good and bad years over that twenty year period.

Q. How do you know that?

A. Through talking with him and seeing some of his financial statements.

[TR. 266]

Q. What financial statements did you see?

A. I saw them going back to, what,

1966, I believe, his profit and loss figures. I believe it went back to '66.

Q. You have nothing between '55 and '66?

A. No, I did not look at them. I just relied on my conversations with Mr. Payne.

Q. And by using this four percent figure, you determined that the goodwill of J. Truett Payne Company on May 28, 1974, was a hundred thousand? Is that your --

A. I don't have my calculator. The figure I have is a hundred fifteen thousand based on the fifty-two thousand five hundred that I had done previously. Forty-seven thousand five hundred times four percent per year for twenty years ought to come out to around a hundred thousand.

Q. So, to get --

A. About a hundred and two thousand.

I saw somebody doing the figure. I would guess around a hundred and two thousand.

Q. And you used this as a bench mark to verify your next figure; is that right?

A. Yes, to see how my next figure comes out.

Q. Your next method, your second method really

[TR. 267]

consists of trying to speculate as to what the market is going to be over the next few years?

A. And what the market was in 1974 and how well Payne would have done given non-discriminatory programs, say, rebates and quota programs that treated all dealers equally.

Q. Let me ask you this. Why do you pick to begin with the year 1974?

A. Well, because that's when we are trying to figure out what the value of

the firm was.

Q. Isn't it a standard practice to look at what the past record of the firm has been and then capitalize that figure over some period to determine the going concern of a business?

A. Yes, that's one method, yes.

Q. In fact, when you explained your methodology to me, you started with the year 1973, did you not, in one of your initial calculations?

A. I don't recall. I'm trying to think.

Q. Let me ask you this.

A. I think the question as it was put to me the other day was what was the value of the firm in May, 1974, and I said, well, you could figure out, well, one method you could use is to take 1974 and figure out what the stream of earnings from that point would be.

[TR. 268]

Q. Let me ask you this, Doctor. If you totaled up -- you have a copy of Mr. Payne's dealer records or dealer statements for the year '71 through the first quarter in '74?

A. Yes.

Q. If you had used those figures and had deducted from that figure your eighty-one some odd thousand that you figure he had payments coming to him, would you arrive at a loss or a profit for Mr. Payne over that four year period?

A. He would have lost about thirty thousand dollars.

Q. In fact, if you use the entire year of '74, you estimated he lost another twenty thousand?

A. I showed you that he had lost twenty-two thousand during the first four months of '74, but that he had suffered

discriminations of about sixteen thousand, so that for his total year he would have lost a total of twenty thousand.

Q. The first year -- you started in '71. Even adding in this figure of eighty-one thousand that you contend is his amount he's entitled to in incentive payments, the first year that you would show him making a profit would be in 1975?

A. 1976.

[TR. 269]

Q. '75 he lost again?

A. Yes.

Q. That's right, he did, didn't he. In fact, he lost another twenty thousand dollars?

A. No. He would have lost ten thousand in '75.

Q. And how did you determine he would have lost ten thousand?

A. Well, based on the fact that he was losing twenty thousand dollars in 1974 on a yearly basis and '75 would have been a bad year, but not as bad as '74 given the recovery of the economy during '75, the reduction in the rate of inflation and some of the solving of the problems in the car industry.

Q. You decided that it would be only half as bad?

A. Yes. '74 was a very bad year. Everything came together in 1974 to mess up the American automobile industry.

Q. Did you make a study to see what was actually happening in the automobile market in the Birmingham, Alabama area in 1975?

A. No, I did not.

Q. Do you know whether the Birmingham, Alabama sales area is a good sales area for Chrysler Corporation or a poor sales

area?

[TR. 270]

A. You mean relative to the country as a whole?

Q. Yes, that's right.

A. From some of the data I've seen, Chrysler did relatively poor in the Birmingham area than they did to the country as a whole, at least in the early years. I don't have it for 1975.

Q. Doesn't the failure to take that into account go considerably to your credibility of this ten thousand dollar figure you have arrived at as a loss figure for the year 1975?

A. The ten thousand dollar figure for 1975 is based on the year 1975 and is related to the previous years. Now, we do have previous results for Payne going back quite a long ways and Payne was a profitable dealer for many years in the

past regardless of how well Birmingham did relative to the country as a whole. He did suffering a lot of troubles in about 1970 and this was when these programs came in and started affecting him. My estimate of the ten thousand loss in '75 was based on the assumption that these discriminatory programs ceased to be discriminatory, that they continued to offer them on a non-discriminatory basis and Payne would then be able to compete on an equal basis with the other dealers in 1975 and I still thought that he would

[TR. 271]

lose money in '75, but not as much as he lost in '74.

Q. You say the sales incentive programs did not have an effect until 1970?

A. No, I did not say that, or if I did, I did not mean to say it. I did not

study them before that. I was actually told that I should study them and it was irrelevant to the case.

Q. The year 1976, you say it's going to be a banner year for Chrysler and for the automobile industry?

A. Yes.

Q. And so, then, to determine what J. Truett Payne Company would have done, assuming that it would have stayed in business that long, you looked at what he did in 1968 which on the information you have was his best year; is that right?

A. Correct. It was also Chrysler's best year prior to 1976. So, Chrysler had the best year in their history in 1968, Payne had its best year in history in 1968. I don't find that particularly coincidental.

Q. Let me --

A. Chrysler did have the best year

in its history in 1976. It is not unreasonable to assume that Payne would have had the best year in their history in

[TR. 272]

1976. Just as everything came together in 1974 to make 1974 a disaster, a lot of things came together in 1976 to make it a wonderful year for the American automobile industry.

Q. Did you make any determination how the industry did in the Birmingham, Alabama area on that date?

A. No.

Q. Did not. Did you make an analysis to see what the market structure was or where the locations were for the Chrysler Plymouth dealers in 1968 as compared to 1976?

A. The change I think is that in 1968 Vestavia or Hall was in Bessemer.

Q. That's right.

A. And I believe are still in business. They go in and out of business.

Q. Do you feel that the transfer of the dealer from Bessemer to Vestavia may well have affected what Mr. Payne would have done, may have prevented him from making as much profit than in '68?

A. Well, there are two things. Bessemer did move from Bessemer to Vestavia. So, if Vestavia were in existence in 1976 and were in business in Vestavia, this would take some of the business away

[TR. 273]

from Payne from that area; however, that area also is the most rapidly growing area in Birmingham in terms of both population and incomes and a very good area for car sales. The data we have and the most recent study that was done

for the City of Birmingham, which they didn't like by the way, by Brookins Institute, I'm sorry, Patelle Institute in Columbus, Ohio, indicates that almost, about half of all the population growth in the Birmingham area since 1970 has occurred in that part of the county, the southern part of the county and over into Shelby County.

Q. Well, if there was a dealer located out there at that time, that might substantially or might very well keep those people going to that dealership, wouldn't it?

A. Well, except that the data shows that Payne did a good part of his business in that area and that these people to a large extent, from a study I have done involving work habits, these people do work downtown, and other studies the marketing men have done indicate that

people do have this trade-off between purchasing from dealers near their house as opposed to where they work. Generally marketing people feel that a person would rather on a balance buy near his place of business rather than his place

[TR. 274]

of work. What you are saying, though, is basically correct, there would have been increasing competition between Payne and Vestavia in that area. What I'm saying is that in addition to that, however, this was such a rapidly growing area and that this was strong competition between Vestavia and Payne that both companies would have benefitted from this tremendous expansion in population and incomes in that area.

Q. And Mr. Payne would have received fifty thousand dollars in that year?

A. The fifty thousand dollars he would have received would have been the total from all his sales, not just those in the southern area. Yes.

Q. The year 1977, a good year, but not so bad for Chrysler, not as good as '76?

A. Right.

Q. Where did you get those figures?

A. Out of the Wall Street Journal.

Q. Did you check anything else?

A. Well, the Wall Street Journal shows car sales, total number of car sales for each company. It shows profit levels by quarter.

Q. Isn't the answer to my question no, you didn't check anything else?

[TR. 275]

A. Other sources?

Q. Yes.

A. No. The Wall Street Journal, they

summarize other sources.

Q. But, nevertheless, you decided you would knock down the profits there about half, then?

A. I went to twenty thousand dollars, yes.

Q. And what's the basis of that?

A. Well, it's more than half. I went from fifty to twenty thousand dollars. Chrysler sales in the country as a whole have been falling off. They're about thirteen percent below, twelve and thirteen percent below what they were in 1976. So, I'm assuming that the sales of Payne would have fallen in '77 relative to '76 and that the profits would have fallen more than their sales.

Q. And 1977, you then decided, -- the Judge cut you off, so you decided to determine the going concern value of the, or determine the value of the business in

the year 1977?

A. Yes. Judge Lynne said that it was too speculative to try to predict or estimate the amount of money that Payne would have made in 1978, so at that point I -- I had figured out what I thought they would make in 1978 and I discounted that. So, instead

[TR. 276]

I went back and changed and said, well, what was the value of the firm in 1977 as a going concern if it had stayed in business until 1977 had it been able to enjoy these two really good years after so many bad years which had hit the entire industry.

[TR. 277]

Q. Amd [sic] then you decided -- you assumed that you would be receiving $20,000.00 from then on?

A. That that would be a reasonable

estimation of the future stream of profits that J. Truett Payne would have earned, and that this would be a reasonable figure for a prospective buyer.

Q. Now, isn't the automobile business an up and down business, depending on what the company puts out, what new cars it puts out?

A. Yes, it's very competitive in that sense, and it's also based to a large extent on the general economy, the health of the economy. You can use unemployment rates, you can use Gross National Products or disposable income. Sometimes we use meeting incomes. We use a lot of aggregate figures for an industry like the automobile industry.

Q. And you picked the rate of ten percent to capitalize those figures?

A. Yes, that's a conservative estimate. The prime interest rate right

now is around six percent. You can borrow a short term from those banks at eight percent. Inflation rate is about six percent. A prospective buyer figuring that he is going to get about $20,000.00 a year in profits from the firm, if he buys into it, would

[TR. 278]

tend to be conservative in his discounting figure in terms of capitalizing the value. He would be a little worried about it, and he would not want to capitalize it at a six percent figure which would give him the much higher rate.

Q. In fact, what risk factor did you add in for this being an atuomobile dealership in determining your capitalization rate?

A. I didn't add in any specific risk factor other than what had been taken

into account from the previous year's earnings. Actually I wrote a paper once indicating that any entering of risk factors was double counting, because you already have your risks into your expected values. In the general literature on economics and financing there is a little difference between myself and the accepted theory in the field. We have expected value on one axis, and risk on the other, and yet the expected value has within it a risk term which is to say in trying to figure out these risk terms what we are doing is making a probability estimate of what the value of the firm would be or the value of the earnings or losses would be in a given year, and part of that risk factor then comes down to the discount rate that you use which is to say we then

[TR. 279]

discount these back to 1974, and to put in an additional risk factor on this is double counting. You're using it twice rather than just once.

Q. You total all of this up, and you came to a figure of $200,000.00?

A. Yeah, that's my estimate without my calculator, which is to say $200,000.00 in 1977 discounted back to 1974 at a six percent rate of discount looked to me like it would come out to about $170,000.00, and I did not figure that out.

Q. Which is $70,000.00 over what you had determined the value would be based on the good will method?

A. That's $70,000.00 more than the bench mark estimate which I was just using in order to come up with it.

Q. And what you did on the method

you prefer is really that you had to speculate what the earnings were going to be in the future, and then capitalize that, assuming they are going to earn twenty thousand dollars forever after the year 1977?

A. No, based on earnings of $50,000.00 in 1976, $20,000.00 in 1977, and a reasonable probability that $20,000.00 per year with ups and downs thereafter would be a reasonable estimate of what

[TR. 280]

that dealership would have been worth, given the non-discriminatory programs, if Payne could have lasted until then, that a prospective buyer coming along at that time would have been willing to pay somewhere around $200,000.00 for that dealership.

[Tr. 443]

Q. All right. And does that -- we've been talking here for the last week about a number of sales incentive programs that are sponsored by the Chrysler-Plymouth Division of Chrysler for about 1971 through the first quarter of 1974, and were you responsible for the design and creation of those programs?

A. Yes, we developed them, I developed them and recommended them to management.

Q. All right. Now, how long has Chrysler utilized

[Tr. 444]

sales incentive programs?

A. To my knowledge since the early 60's we've used various forms of sales incentive programs.

Q. All right. And what is the --

this may be an obvious question but what is the purpose of the sales incentive program?

A. To stimulate our sales organization, our dealers to sell more cars.

Q. And you say to sell more cars. In relation to your competitors?

A. That's correct, to gain a larger share of the market place.

Q. Who are your major competitors?

A. General Motors and Ford.

Q. And where do you stand in relation to those two automobile manufacturing concerns?

A. Well, we are third, obviously the smallest of the big three. We're approximately half the size of Ford and maybe less than a third of the size of General Motors in terms of our sales.

Q. Now, can you tell us in terms

of percentage of the market, can you state it that way?

A. We do approximately 16 percent of the domestic market. General Motors does anywhere from 52 to 56 percent. Ford Motor Company does about 27 or 28 percent

[Tr. 445]

of the market.

Q. All right. Now, I want to direct your attention in general terms, if I can, to the sales incentive programs that were utilized during the period of 1971 through the first quarter of 1974, and specifically ask you -- I think it's already in evidence, but whether or not basically two types of sales incentive programs --

A. Well, we've used really various types of basic incentive programs. However, it may be more generally characterizing them. We've had wholesale

phases in some and wholesale-retail programs with the wholesale phase in some and other programs we've had them in retail only programs.

Q. And I think the evidence is that the wholesale-retail programs that you've described have some sort of wholesale purchase objective combined with a retail delivery objective or retail deliveries as a criteria for the payment of bonus, is that correct?

A. Right. We've paid always on the basis of retail sales and it may or may not have been tied in with a retail objective but in many of the programs we had a wholesale qualification phase.

Q. All right. Without going into any specific program or without belaboring the issue, can you tell us basically how the wholesale-retail program, I call

[Tr. 446]

it, works, in general terms.

A. We would first of all forecast a retail for the entire country, retail sales volume for the entire country. We would then break that down to a zone forecast of retail business.

Q. Now by zone you mean sales zone or sales regions?

A. That's correct. We have 22 zones today to comprise the sales areas of the United States. We then developed from that our production forecast and we then break that down into the zone forecast of production. In the wholesale qualification phase of our program we would determine each dealers share of that retail and of the wholesale that this individual -- that the dealers would buy to qualify for the program and if they purchase what we had requested them to do, they would then be

paid on retail sales.

Q. All right. Now, observing a number of those programs, it appears that there are levels of rewards or bonuses under these wholesale-retail programs, is that correct?

A. Quite often we would have differing levels of payments to dealers depending upon their performance against our objective. In other words, if we asked the dealer to participate by buying a hundred cars and in a program period, let's say, maybe three months, and if

[Tr. 447]

he only bought 80, he could perhaps participate at a lower level. If he bought at 100, he would get at somewhat a higher level and perhaps we might even have a third level where if he bought more than what we asked him to buy he would be rewarded even with a higher

level of payment.

Q. All right. We'll get to this in a minute, but let me ask you, the wholesale purchase objectives that are set, of course, in terms of numbers of cars, won't be equal in terms of absolute numbers of cars for each dealer, is that correct?

A. That's correct.

Q. All right. Would it be fair to say, however, that whatever objective is set that the same payment is made to each dealer provided they meet the same percentage of attainment of that objective?

A. That is correct. Our attempt or purpose in developing any program was to establish a base line by which all dealers could participate with equal ease in the program and then we would pay based on performance against

those objectives.

Q. Now, why do you at times have a wholesale qualification purchase phase connected with the retail sale bonus aspect?

A. Well, the program is designed to satisfy a

[Tr. 448]

current set of conditions or problems. Let us say that we foresee a build-up in inventories developing and we want to solve that problem, we then project a program that we feel will help alleviate the wholesale problem and encourage the dealer to sell more cars. Basically our purpose is always to increase our level of sales which is really the only solution or let's say the real solution to an inventory problem.

Q. All right. When you say you either have or anticipate an inventory problem, can't you just shut the factory

down or something like that to keep from having an inventory build-up?

A. Our programs are developed five months in advance. In other words, we've got to forecast five months in advance the exact number of cars we're going to sell. Now, that's humanly impossible to do. We'll either guess low or we'll guess high, so, you know, you've got to admit that there will be error to begin with. Those commitments then in terms of production that we have forecasted are transmitted to our suppliers and they set their production wheels into motion to satisfy our parts needs for the production that we have forecasted. If we are to foresee, or let's say that something happens in the market place that the retail business falls off from what we had forecasted and an

[Tr. 449]
inventory develops, to shut our plants down on a short term is difficult if not impossible to do. We require anywhere from two or four months lead time to shut our plants down. The alternative obviously is to increase our sales. Also shutting the plants down creates problems as well, creates problems for suppliers, creates problems for our workers, it creates problems in the communities that our people are employed in, so really if our forecast proves out the most favorable kind of solution we could provide would be to increase our business, increase our share of the market.

[Tr. 451]
Q. Now, as we discussed, you've got a wholesale phase of it or wholesale purchase and then you pay for retail sales. I mean what is the purpose? Is it the wholesale to obtain the purchase

of automobiles or is it the retail sale of automobiles?

[Tr. 452]

A. The basis -- the very basic purpose of every program is to increase our retail sales activity, for us to get a bigger share of the market place. However, and we're willing to lay out funds to do that. We're willing to lay out rewards and incentives, carrots in front of the dealer to get him to sell more cars. Now, we may also be looking at a problem with our own inventories or dealer inventories. Our own inventories where we have cars that are built at the factory that are unsold or dealer inventories where we can foresee the dealer -- his inventories are high and he will not order cars during this immediate period of time, to keep our plants going we would then have a wholesale qualification phase to move those

units which we can't stop building and then if the dealer does that we will pay him at retail which the purpose is to get him to sell more cars.

Q. Would it be fair to say that the payment is made on retail sales, it's not made on wholesale purchases?

A. That is correct.

Q. And the level of payment basically is based on the percentage of accomplishment of wholesale purchases?

A. That is correct.

[Tr. 453]

Q. All right. Could you tell us before we go into it in any detail, could you tell us generally what that formula is?

A. We -- in the development of a dealer objectives, we take what we call his rate of travel which is really a measure of his current sales performance and we also take a planning potential in

this period of time which is a measure of his expected performance, what we expect him to sell, and we weight those 50-50, 50 percent each, and develop the responsibility for each dealer.

Q. All right. Now, so it's a 50-50 formula, as I understand it, 50 percent is based upon what he's actually doing, his retail deliveries as you call it, and 50 percent on what he has been expected to do or

[Tr. 454]

his planning potential, is that correct?

A. That's correct.

[Tr. 460]

Q. And that way it gives an equal balance to your poor performers and your better performers, is that correct?

A. What we're trying to do is give every dealer an opportunity to participate in the program because, very frankly,

our most successful programs are the ones where we have the highest participation of dealers. If we can get 100 percent of our dealers in the program and they can all earn money, obviously they are all selling additional cars and the program is extremely successful, so we are trying at all times to put all dealers on the same base line so that they all can participate in the program.

Q. What would happen if instead of computing it on that basis you just set a flat number without any relation to anything, just say buy a hundred cars, everybody?

A. Well, it would be an unjust objective because, obviously, for one dealer a hundred cars is absolutely no problem and another dealer there's no way that he could ever participate in the program. He might sell a hundred

cars in six months or a year and we would be asking him to do it in, say, a three-month program. It would be unrealistic to assign such an objective.

[Tr. 462]

Q. Now, I also noticed, Mr. Piconke, that in some of the programs that were used during this period of time that there was no wholesale purchase objective involved,

[Tr. 463]

it was strictly just a retail delivery objective?

A. That's right.

Q. And many of those appeared to have some base line, that is, some minimum performance criteria which equaled a hundred percent of their objective, many of them were based on prior performance at an earlier time, is that correct?

A. That's correct.

Q. All right. Why do you at

times elect to use one and not the other?

A. The programs again, as I indicated, are designed to either reach for more business and to solve current problems. If we did not see an inventory problem and saw perhaps a market opportunity or let's say the dealer sales in a particular line were backing up although we did not have an inventory problem, we would run a retail only program with a retail only objective and reward dealers again for performance based against that objective, to help them move those cars and to help them put interest in their sales organization to sell that particular line of cars.

Q. Now, these retail objectives and those where you did not have a wholesale objective, I notice a number of them are based on some prior performance

at some earlier or current period of time. How did you

[Tr. 464]

select that particular period of time to use as the measuring rod, so to speak?

A. Well, we were looking for similar circumstances in the market place in trying to relate to it. In other words, if we ran a program, let's say, April, May and June, if it looked like the market conditions of this April, May and June were very similar to last April, May and June, we might simply say to the dealer, beat last year. It's a number that he knows, it's a number that is available to us and easily obtained, no calculations really are necessary and we would then ask the dealer to work against his own performance.

Q. But the period of time selected as the base measure would have some relation to the period of time in which

the program would be in existence?

A. That is correct.

Q. In terms of ability to perform?

A. That's right. We're looking for the same market situation. I'll not say we're looking for the market to be a little softer than last year. We might say 90 percent of last year is, for example, what you should do and we would pay at some level of performance against that 90 percent objective.

[Tr. 468]

Q. Now, once you develop one of these programs and put them into effect, how are the dealers notified? I mean, what information is given to them? How are they explained the situation?

A. Well, when we launch a program we send each dealer a letter, very generally explain the program, and to that is attached the rules which provide all of the detailed information about the

mechanics of the

[Tr. 469]
program and how the payments will be made to the dealer, on what criteria. We also develop instructions for our zone offices to make them as thoroughly familiar with the program as we possibly can and teach them how to calculate the earnings potential for each individual dealer. They in turn instruct their district managers and the district manager then contacts the dealer and encourages him to participate, outlines the potential earnings in the program and clears up any possible questions or impressions that a dealer might have about the programs.

Q. I notice that during the years, well, '71 to '74 the numbers of programs would fluctuate to a degree. Why is That?

A. Well, we would develop programs

based on our needs and the opportunities in the market place and very basically we developed programs when there are changes occurring, either up or down in the market place. When things are rather status quo is when it's most difficult to undertake programs which will result in increased sales.

Q. I also notice you have a fair number of programs or a good number during that period of time? Why is that?

A. Chrysler Corporation is probably more aggressive in the market place than General Motors and Ford. We

[Tr. 470]

are the smallest of the big three, we have to literally try harder to gain penetration. We've got to take away business from General Motors and Ford to increase our share of the market place and we would be expending these

funds to encourage our dealers to do so based on the opportunities that we saw in the market place.

Q I'll ask you whether or not one of the purposes of these sales incentive programs are to say stir competition among your Chrysler-Plymouth dealers in a sales locality?

MR. REEVES: Object to the form of the question, Your Honor.

THE COURT: I overrule that objection.

Q. You may answer.

A. It would really be pretty stupid for Chrysler Corporation to put monies, and I mean these are substantial monies. We may spend fifty, sixty million dollars, even more, in a given year on incentive programs. It would really be pretty stupid for us to spend that kind of money to simply redistribute the

sales that we were already going to get. Our whole purpose is to increase our share of the market and that's what the really entire automobile business is about, getting a larger and larger share of the automobile market that exists and we think these programs have contributed to successes at Chrysler.

[Tr. 473]

Q. Now, Mr. Piconke, are these programs, in your opinion, equally available to all dealers of Chrysler products?

A. Yes. We go through great pains and we are very determined to make sure that all dealers have the best possible opportunity, equal opportunity to participate in the programs because our purpose is to have as many dealers -- we would like to have all dealers participate in them.

Q. And I'll ask you again, I think I've asked you once before, are

these programs designed either through mathematical computations or through some prior performance of the dealer to be geared to the dealers own ability to perform?

A. That's correct.

[Tr. 475]

Q. Mr. Piconke, with respect to General Motors and Ford, do you know whether or not they utilized incentive programs?

A. Yes, both General Motors and Ford Utilize incentive programs to stimulate sales.

Q. Do you know whether or not they are in the form or in the nature of the incentive programs that have been used during this period 1971 through the first part of 1974?

MR. REEVES: I'm going to object to that, Your Honor. It's irrelevant.

THE COURT: I overrule that objection.

A. Yes, General Motors and Ford have run programs similar to us in that they have differing levels of payments for giving performance and, however, they do differ in one respect. They usually do not include a wholesale qualification whereas we have often used both wholesale-retail programs and retail only programs and General Motors and Ford usually use retail only programs.

Q. But they do sponsor programs that are based upon some set objective beyond which you must perform

[Tr. 476]

to obtain incentive funds, is that correct?

A. That is correct, and they provide differing levels of payments for those differing performance levels.

Eric W. Lindenberg

[Tr. 526]

Q. Now, I'll ask you where you

obtained -- let's take first J. Truett Payne Company -- where you obtained the gross profit figure of $252,389.00 there?

A. Okay. I guess first we ought to identify what gross profit is. Gross profit is what a dealer develops by selling his car at retail or at fleet to the customer. That figure, be it -- let's use, for example, on one vehicle, it's $5,000.00 and his cost to that car is he

[Tr. 527]

purchased it from Chrysler Motors Corporation at $4,000.00. The difference between that four and five is a thousand dollars which would be gross profit. Now, in establishing the cost of a vehicle, there's a number of things that go into that. You have salesmen's commissions, you have get-ready charges, a number of things that will build up the cost of that car besides just what they

paid to Chrysler Corporation at the factory. Okay. The incentive programs which you've been hearing so much about are also taken into consideration into that cost. The normal procedure used and it is recommended by the Dealer Uniform Accounting Systems, any incentive monies that are paid under these programs on these particular same cars we're talking about now are to be a reduction in the cost of the sale. So if we're talking about a cost of four, now we've paid a commission and we've paid a get-ready charge and we've gotten a fleet incentive as a credit back to that, then we come up, say, with a cost factor of $4500.00; so that means that the gross profit now is $500.00. That is the figure that shows here. It's the sum of all of those things as relate to the sale of new cars.

Now, in that figure as well is finance and insurance income. If they took this car that they sold for $5,000.00 and financed it through whatever the credit

[Tr. 528]

source, the bank, Chrysler Credit or what have you, and they receive an income from selling that contract to that finance source, that's also included in gross profit. So gross profit consists of not only the sale of the vehicle but any incomes that are derived from that sale which would be incentive monies, rebate monies, finance and insurance money, discount charges, all of these things go into it. Now, I would like to add the figure as it applies to two of these dealers --

[Tr. 530]

Q. Would you tell me where the -- how you derived the net income figures?

A. Okay. That's another step. An automotive accounting isn't as simple as it is in many other retail businesses. It's quite complicated. You have so many expenses that fall into the operation of an automobile dealership where you wouldn't have it in, say, selling a hamburger, but the net figure as it appears here on this exhibit is the net result of the gross profit that you get for that sale of that vehicle. Let's go back to that $5,000.00 car that we're talking about. We're down to a $500.00 gross profit after everything

[Tr. 531]

was considered. Now, in order for them to sell that car they have to develop many other expenses, expenses for advertising, expenses for having the facility to sell out of. There's a number of things that go into this expense account. So it's a difference

between that $500.00 gross figure and these other expenses that develop the net. The net is the bottom line figure in the sale of a new vehicle.

[Tr. 538]

Q. In examining Mr. Payne's dealership records and his financial statements, did you observe any areas in there which appeared to you from your examination to -- that may have or did contribute to his decline in profit picture during this period of time?

A. Yes, I did.

Q. What area was that?

A. Well, there were a couple of areas, but the primary area was the used car operation and the used car operation as it is shown here showed a considerable less income per unit than any of the other three dealerships. You can see that in your average gross column. The average gross that the J.

Truett Payne Company made on a used sale in the year of '71 up there is $104.00 as opposed to 291, 188 and 232 for the three other dealers.

[Tr. 539]

So in reviewing the financial statements and comparing J. Truett Payne Company operation to that of Roebuck's and Central and Vestavia, the primary area falls into used cars as far as the area that the dealership lost money in. Now, there was some variances in the service and parts division of this financial statement, but the amounts were rather insignificant and I'm sure they attributed to his loss, but the primary areas in this used car operation.

Dr. Martin Geisel

[Tr. 554]

Direct Examination

[Tr. 570]

Q. Now, with respect to the portion of Dr. Ignatin's testimony, Dr.

Geisel, dealing with his opinion on the effect of these sales incentive programs on competition, and I believe you heard him testify that he thought it would have a bad effect in the sense that it would insulate one dealer because he could use this money to offset the cost of the cars and it would disfavor the other dealer because it would give him an unfair advantage. Do you have an opinion on whether or not these sales incentive programs as you understand them would have such an effect upon competition among the Chrysler-

[Tr. 571]

Plymouth dealers in the Birmingham Metro area?

A. I do have an opinion.

Q. All right. What is that?

A. My opinion is that these programs would not have such an effect and indeed I think the facts show that

they did not have such an effect.

Q. All right. I'll ask you whether or not you made any calculations with regard to that?

A. Yes, I did.

Q. Let me get a blank piece of paper.

A. Should I describe what I did?

Q. Yes, tell us what you did.

A. All right. What I did was look over -- for each year from 1971, 1972, and 1973 and then for the total of the three years I looked at sort of the total impact of these incentive programs on the various dealers and by that I mean I took each year's total incentive payments to each dealer and divided by the number of retail units he sold, so we then have a number which is in terms of dollars per unit. Okay. How much incentive money on the basis of his

total sales did he get per car?

Q. All right. Let me stop you there. Did you take fleet automobiles out of it?

A. No. This is just retail sales.

[Tr. 572]

Q. Just retail. Okay.

A. The fleet sales, those are sales to large volume purchasers and there are special programs for fleet sales that Chrysler has, Ford has, and I don't know whether G.M. does or not, but those are separate programs and a dealer who sells fleets can qualify for bonuses in that respect too, and it would be inappropriate to mix those in with the --

Q. So you did pull the fleet sales out?

A. Yes, I did.

[Tr. 577]

Q. All right. Now, that's for the three years, I take it?

A. That's for the three years separately, that's correct.

Q. Now, let me ask you this question: Why did you divide the incentive earnings over the total units sold rather than try to divide it into -- by programs, say, into the units sold under each program and that method?

A. Well, I don't think there's anything wrong with looking at individual programs, but, first of all, you would expect that there would be some variance because

[Tr. 578]

the objectives depend on -- in part at least and sometimes in whole on prior rate of travel, so some months a dealer had, say, an exceptionally good March last year; well, then, he's got a tough objective to live up against on the

March contest this year, and somebody who had a bad March last year has got an easy objective, you know. So you expect to see from program to program some variation in who comes out on top and that's first of all.

Second of all, there are programs, if you remember those charts, there are programs of one sort or another going on most of the time. They don't -- do not necessarily cover all car lines at all times, but they cover -- there's generally speaking some program covering some portion of the cars, so that a major amount, a major fraction of total sales are covered by some incentive program.

Q. All right. Now, did you make the calculation for the entire period of time for those three years?

A. Yes, right. These are just the

totals of it by dealer.

[Tr. 580]

Q. No, that's not necessary. Now, I guess basically what that reflects is that divided over all of the units, Mr. Payne or J. Truett Payne was high on a per unit basis in '71 and '73 and low in '72, is that correct?

A. That's correct. He was number one out of four in terms of incentive payments per unit sold in 1971 and 1973. In contrast, he was on the bottom in 1972.

Q. When you take that three-year average he finishes basically ahead of Roebuck and behind Vestavia about a dollar to two dollars a car?

A. I would regard all three of those as being equal, I mean a dollar is -- it's true, Roebuck is $51.00, Payne is $52.00 and Vestavia is $53.00.

Q. All right. Now, with respect to those

[Tr. 581]
calculations, Dr. Geisel, do you have an opinion as to the effect that these sales incentive programs and the bonus monies paid thereunder would have had on competition arising out of the payment of incentive money?

A. Yes. In my opinion the -- any cost differentials to the dealers arising out of this are so insignificant as -- so that the effect on competition would be nonexistent.

Q. Could you explain that in a little more detail?

A. Well, what we're talking about really is a maximum difference between any of these dealers of $11.00. That's between Central and Roebuck over the three years. Okay. So, you know, for some period -- a short period of time there may have been bigger differences in one direction and then the things change and

somebody else has an advantage for a short period of time, but the maximum difference here is $11.00 between Central and Roebuck. Okay, and, in fact, three of the dealers within $20.00 of each other. It's my opinion that an $11.00 differential on a three, four, five, $7,000 piece of equipment is a rather minor negligible factor and that assumes really that, indeed, that $11.00 would go directly into the retail price which it might or might not do. All right. I don't think many people who lived out near Roebuck, say, for

[Tr. 582]

whom Roebuck was the natural place to buy would go to Central for $11.00.

Q. So is it your opinion then that even if you assume that money was used to reduce the cost of the car to the consumer that the amount of differential between the two would be so negli-

gible it wouldn't entice one customer from one Chrysler-Plymouth dealer to another?

A. I guess I would be willing to say that it wouldn't entice one customer to another in a sense that somebody might be willing to do that. I just don't think that's going to be quantitatively important. Not very many people are going to drive ten miles and, remember, they don't have to but they usually find it in their interest to have the car serviced where they bought it. Dealers tend to favor people who bought their car there, at least people think so, so it's not just one trip that they're going but it's several future trips as well. I just don't think there's room for much of that there.

[Tr. 584]

Q. I'll ask you whether or not you reviewed the dealer financial state-

ments for the years 1971, '72 and '73 of J. Truett Payne Company?

A. I did.

Q. Based on your observations of those financial statements did you come to any conclusion or reach an opinion as to what difficulties that dealership may have been encountering in its various departments during that period of time?

[Tr. 585]

A. Yes.

Q. Did you make any calculations with reference to that subject matter?

A. I did make some calculations.

[Tr. 587]

Q. Okay.

A. So what we see is, after the first two years in which we had information were profitable, from then on, from 1969 on, a period of five years and a partial sixth year of continuous losses in the business. All right. And that's

not due -- may be partially due to but -- well, new car sales fell in '69 and '70. They recovered again quite well in '71, '2 and '3. Okay. So, we're not likely to find the new car business as being a major source of problems in this dealership. It's true they are not back to where they were in '68.

Q. But that was, I believe, a good year for J. Truett Payne, is that correct?

A. This is the only information I have.

Q. Right.

A. And it's the best. All right?

Q. Okay. Now, what?

A. All right. So we looked elsewhere. Other departments in Payne's operation. All right. In the

[Tr. 588]

first place I looked was the used vehicle department and I also looked at

the service and parts departments. All right.

Let me talk about the service and parts departments first. All right. And I did this for 1970 to 1973. I looked at the net profit that was coming out of the service department, the net profit that was coming out of the parts department. What we mean by net profit --

Q. Tell me how you want me to set up these columns first.

A. All right. Let's have the year.

Q. All right.

A. This is for Payne now. Okay. Then let's say service net next to that.

Q. All right.

A. And then let's say, and I'll explain what this means next to that, PNUS.

Q. All right.

A. So for -- I'll give you the numbers and then we can talk about them. 1970, service net was $46,630.00.

Q. All right.

A. Per new unit sold is $85.00. In other words, that takes that $46.00, 630 and divides by the number of automobiles sold that year to see how much service profit is being made per car, per car sold.

[Tr. 589]

Q. All right.

A. Okay. Now, that's the service department. Now let's do the same thing for parts so it will be, instead of service net, it will be parts net there in the middle.

[Tr. 590]

Q. All right.

A. Now, let me explain, now that we have these numbers down here, let me

explain what service and parts net are. I guess as everybody knows in the automobile business they have a new vehicle department and a used vehicle department, parts department, service department. They may have a leasing department, other things, but the major things are new and used vehicles and parts and services. All right. And they keep there accounts on a departmental basis. Okay. So when they talk about service net or parts net, what they mean is this is the amount of profit. Okay. That's sales in the parts department, the price of the parts less the cost of the parts, okay, less the cost of the salary of the parts de-partment manager and any clerks that are around there, so all of the direct expenses of the parts department are taken out. Okay. So this net is what -- that's going to be the contri-

bution for paying the rent, paying the light bill and profit. Okay.

[Tr. 591]
And that's -- now, look what's happening in both of these cases. All right? Well, his business was -- his new car business was basically growing. Okay. Both his service and parts business is declining. Okay. So it's not a decline that's parallelling a new car decline. In fact, the new cars are, you know, going up from '70 to '71, okay, and then holding at a good level for '72 and '73. All right. Meanwhile the parts and service business is declining. Well, you would expect if the new car business is going up or holding steady that this business would go up or hold steady, so something is wrong here.

Now, I didn't make a detailed study of Payne's operation by any means, but this is the kind of thing that you can

see from a financial statement. There's something funny here. This business shouldn't be going downhill while the new car business isn't.

Q. In other words, in his parts and services you've got a continual decline from 1970 in services from 85 down to $31.00 in 1973, is that correct?

A. That's correct.

Q. And in the parts department you've got a decline from $96.00 down to $60.00?

A. Right.

Q. In 1973?

[Tr. 592]

A. Yes.

Q. All right. Now, you've used this per new unit sold?

A. Right.

Q. Why do you use that or is that your method or is it a standard method or how did you arrive at that?

A. It's a very common thing in the automobile industry. They have different initials that they use, sometimes it's PNUR, that's "Per new unit retail." I use per new unit sold here because I divided by both the total sales, retail and fleet, since that's what the service and parts business has done on all sales. Okay. That is a common measure. Those things are very common in the automobile industry for the simple reason that if you want to compare dealers or want to compare a dealer across years you have to correct for the size of the operation. Okay. This puts everythin on a common denominator. How much do they do per car? Okay. Well, a $200.00 car dealer is going to do a lot less than a $2,000.00 car dealer in total, but you can look at how much they did per car to compare them and it's

a standard procedure.

Q. Now, did you make any other observations with respect to the dealer financial statements?

A. Right. I also looked at the used car -- the

[Tr. 593]

used vehicle department. I did the same kind of calculation for 1970 to 1973 there, so if you wrote small, you might get it on the bottom or we could start a new sheet. On this one I actually went -- since I had the statements for the other dealers I actually went and compared year by year how they were doing, you know; in other words, made a comparison such as is indicated on that chart down there. But I'm doing the same thing here. Net profit, okay, from the used car departments, units sold, that's new units sold. Well, okay, net profit first. Units sold. There are used units

now.

[Tr. 599]

A. Well, again, without knowing why he's not doing the used car business. All right. Both has declined over time $51.00 per car net in 1970, then $13.00, 27 and 12 in '71, two and three. Okay. So, he's not doing well compared to himself. Okay. He's doing horribly compared to the other dealers. I mean the other three dealers have a much better used car business. I guess it's particularly striking for Roebuck which is a dealer -- a new car dealer of about the same size in terms of total new units sales as Payne and look at the difference in used car sales and profits. Okay. 25,000 versus 173,000, because he sells over twice as many and he makes three times as much on them. Similarly, even more striking in '73. Okay.

Q. And then going back to '71 and

-- '70 and '71?

A. Fundamentally the same picture there, although in '70 he was closer to the others, but still on the bottom compared to what they were doing in terms of, you know, bringing home the bacon in used cars, so to speak.

[Tr. 607]

Q. Let me stop you there for a minute. Did you look at the other dealers between, say, '70 and '73 or '74?

A. In connection with, you know, with these other

[Tr. 608]

studies, I did look at their financial statements and so I looked at what their net profits were.

Q. What about their correlation with Chrysler on a trend basis?

A. Well, I guess the earliest statements that I had available to me for Central and Roebuck were 1969. All

right? And they -- well, let me just read to the nearest thousand, Central's profits, $34,000.00 in '69, $33,000.00 in '70, $34,000.00 in '71, $72,000.00 in '72, $24,000.00 in '73 and $49,000.00 in '74. All right. Well, that doesn't bear much relationship to Chrysler's profits either. All right. For example, Chrysler did poorly in '74, Central had one of its better years. Chrysler did -- was at a relative peak in '73, Central was at its lowest year in this period.

Roebuck shows a similar lack of correspondence. $60,000.00 in 1969, $44,000.00 in 1970, okay, 1970 is the year when Chrysler lost money, Roebuck had a relative -- a decent profit. '71, $47,000.00; '72 was $35,000.00. '73, $50,000.00. '74, $48,000.00, again when Chrysler is losing money. It had no impact on this dealer. Did I say '74?

$48,000.00. Correct. It's probably true, incidentally, that that carries over into 1975 that Chrysler did have a very bad year.

Q. All right. Let me stop you just a minute.

[Tr. 609]

A. All right.

Q. We have introduced into evidence the dealer financial statements for Chrysler Motors Corporation -- for Central Motors Corporation and for Roebuck Chrysler-Plymouth and let me hand those to you and ask you what correlation, if any, you draw from that versus Chrysler Products?

A. Well, Central in 1975 -- 1975 is a disastrous year for Chrysler Corporation. I don't remember exactly what their losses were but their sales fell off, stayed at a low level from '74 and their profits -- I mean they had

huge losses. Central in 1975 made $73,000.00. Okay. Rounding it to the nearest thousand I'll say $74,000.00. And in 1976, okay, which is now a record year for Chrysler, their profits are essentially the same, $79,000.00. Okay? So in Chrysler worst year they had one of their best years. They had had a good year like that in '72 as well, $72,000.00 in '72 and they had $74,000.00 in '75 and $79,000.00 in '76. All right. But, you see, I think looking at these dealer profits that they are unrelated to the Corporate profits of Chrysler Corporation. Okay?

Q. In other words, it's your testimony that Dr. Ignatin's attempt to equate the performance of Chrysler Corporation with performance of a dealer at some future time is not sound? [Tr.610]

MR. REEVES: I object to the form

of that question, Your Honor.

THE COURT: I overrule the objection.

A. That is not sound in my opinion, yes.

Q. All right. Do you have any other comments relative to his computations?

A. Well, incidentally, since I have Roebuck up here, I would note that Roebuck in 1975 earned $40,000.00. It's one of his poorer years since 1969, but still a substantial profit. In 1976 Chrysler's best year, Roebuck only earned $7,000.00. Okay. It's worst year by far in terms of net profit.

Q. And you're taking the net earnings?

A. These are net earnings, that's correct.

[Tr. 617]

Q. And you don't disagree, do you, that the result of an individual

program or rebate or incentive program is to in effect reduce the price of the automobile purchased by the dealer from Chrysler, you don't

[Tr. 618]

disagree with that, do you?

A. I don't disagree with the fact that the effect of incentive programs is to provide dealers with payments. All right. Now, if you're asking me to say that that means that this particular blue Valiant over here cost $50.00 -- cost $50.00 less than that red Valiant over there, I would not agree with that. It provides payment for performing, for selling and buying and selling cars, okay? It has the net effect of reducing the overall cost of the vehicles, that's all.

Q. It has the net effect of reducing the cost of the vehicle?

A. Right.

[Tr. 705]

Q. Do you think it's unreasonable to devise an incentive program that pays a person an incentive based upon what he is able to do, what his strength is, what his potential is as opposed to the strength and potential of the other, say, Chrysler-Plymouth dealer? Is that a bad thing?

A. I would say that if you used a much better method than Chrysler used in Birmingham, it might have

[Tr. 706]

been fair. I really can't tell without having, you know -- it's a hypothetical question. What if they had used a fair non-discriminatory method? What would have happened? Well, what I have said is that what would have happened is Payne would have gotten $80,000.00 in

total monies and would still be in business today.

Q. Well, of course, you're ignoring the fact that he had lost another $30,000.00 on top of the 80?

A. No, I didn't ignore the fact that he had lost money. I said that he wouldn't have lost anywhere near what he had and counting in all of the monies he took out in executive salaries he would have unquestionably been in business today.

J. Truett Payne

[Tr. 711]

Q. (By Mr. Reeves:) One other question to Mr. Payne. Mr. Payne, you've heard some testimony today about -- and yesterday or Thursday rather about the used car operations at your facility during 1970 through '74. Can you tell the ladies and gentlemen of the jury whether or not you over-allowed for used

cars, and if so, why?

A. Yes. During those rebate periods when we didn't qualify, couldn't qualify, in order to meet competition and in order to sell new cars, we had to over-allow on our used cars. Now, that would naturally cut down on our profit on our used cars.

Q. What is over-allow mean, just for their information?

[Tr. 712]

A. It's this simple. If I have a customer that I'm trying to sell a new car to and if I offer him $800.00 for his car and he tells me that somebody else has offered him $850.00, in 99 cases out of 100 in order for me to get his business I've got to raise my bid on his -- on my used car to match the other bid. That's been going on since the beginning of the automobile industry. What people get for their used cars is of primary

interest to them. Now, the only way that I could do that, I was not getting any rebate on the program and I had to over-allow on the used car whereas if they had qualified for the program, in many cases they were getting $50.00, at some programs $100.00, some 30, but that put me at a disadvantage. It's that simple.

[Tr. 717]

MORNING SESSION 10:00 A.M.

THE COURT: The arguments are alloted one hour to the side. After the argument for the Defendant we will take a ten minute recess and then the Plaintiff will conclude.

All right, gentlemen, go to the jury.

[Tr. 727]

Dr. Ignatin testified that there were two methods to judge the value of a going concern, the value of his busi-

ness, his goodwill. The Defendants' own expert, Dr. Geisel, also agreed that there were two methods. He discounted the lower figure method. He said that Dr. Ignatin came up with, he didn't agree that that was the best way to do it. He agreed with the method of the second calculation that Dr. Ignatin used but he disagreed with the figure. He said it has some value but we don't know how much, it's a hard thing to estimate. But he did agree that Dr. Ignatin's principle was right. We have one figure Dr. Ignatin says is $100,000.00 is the worth of the business, and his other figure is $200,000.00. Well, for our purposes today, take the $100,000.00 figure as being the correct amount. If you add $100,000.00 and $81,000.00, we have shown the cost difference, you will see that totals $181,000.00, and that's

how much we claim and that we have proved that J. Truett Payne Company was damaged.

W I N T E R W I N N E R S

11/11/70 - 1/31/71

Paid on Sales After W/S Obj. Attained

Pur. Obj.	C/L Group	JTP Sales	JTP Reb./P.U.	All Others Reb./P.U.	Diff.
JTP - 99	Val-Bar	17	0	30	510
Central - 63	Bel-Sat	13	0	45	585
Bessemer - 39	Ch-Imp	42	0	60	2,520
Roebuck - 54	Fury	17	0	45	765
	Fy W/O	15	0	60	900
					$ 5,280

[Plt. Ex. 37]

W I N T E R W I N N E R S

11/11/70 - 12/31/70

(Floor Plan Rebates Portion - Paid on Purchase)

	Rebates P.U.	Purchases
JTP	$ -0-	72
Central	26.30	77
Bessemer	26.57	48
Roebuck	41.05	95

TOTAL REBATES JTP WOULD HAVE RECEIVED - $2,955.60

[Plt. Ex. 38]

1971 BIG DOLLAR PAYOFF

1/1/71 - 4/30/71

Rebates paid on Sales

C/L Group	JTP Sales	JTP Reb./P.U.	ROE. Reb./P.U.	Difference
Val	51	28.43	54.03	$1,305.65
Others	163	107.98	35.59	(NEG.)

[Plt. Ex. 39]

1971 BIG DOLLAR PAYOFF

1/1/71 - 3/31/71

(Floor Plan Rebates Portion-Paid on Purchases)

	Reb./P.U.	Purchases
JTP	$ 26.38	188
Central	.49	109
Bessemer	26.00	98
Roebuck	30.81	129

Total rebate JTP would have received - $5,792.88

JTP received $4,800.00. Difference - $ 992.28

[Plt. Ex. 40]

S U M M E R S E L L O U T

3/1/71 - Fall, 1971

Paid on Sales After W/S Obj. Attained

C/L Group	JTP Sales	JTP Reb./P.U.	ROE. Reb./P.U.	Difference
Val	110	$ 9.41	$25.00	$ 1,715.00
Bar-Sat-Fy	103	11.65	60.00	4,980.00
Ch-Imp	61	13.20	70.00	3,465.00
				$10,160.00

[Plt. Ex. 41]

W I N T E R P R O F I T D A Y S

11/21/71 - 1/31/72

Paid on Sales After W/S Obj. Attained.

C/L Group	JTP Sales	JTP Reb./P.U.	ROE+VEST Reb./P.U.	Difference
1972 Val-Bar	28	-0-	$ 35.00	$ 980.00
Sat	10	-0-	55.00	550.00
Fy-Ch-Imp	43	-0-	65.00	2,795.00
1971 Val-Bar	8	-0-	70.00	560.00
Sat	7	-0-	-0-	
Fy-Ch-Imp	15	-0-	130.00	1,950.00
				$6,835.00

[Plt. Ex. 42]

S T O C K E L I M I N A T O R

8/11/71 - 1/31/72

Rebates Paid on All Sales

C/L Group	JTP Sales	JTP Reb./P.U.	Hall Reb./P.U.	Difference
Compact	40	$ 68.75	$ 68.18	(NEG.)
Other	108	100.00	100.00	

[Plt. Ex. 43]

C H R Y S L E R - P L Y M O U T H S E L L N O W

1/1/72 - 4/30/72

Paid on Sales After W/S Obj. Attained

C/L Group	JTP Sales	JTP Reb./P.U.	Vestavia Cen+Roe Reb./P.U.	Difference
Val-Bar	81	$17.72	$35.00	$1,400.00
Sat	30	14.67	55.00	1,210.00
Fy-Ch-Imp	72	52.22	65.00	920.00
				$ 3,530.00

[Plt. Ex. 44]

CHRY/FY PROFIT PROGRAM

1/1/72 - 3/31/72

Rebate on Sales

JTP Sales	JTP Reb./P.U.	Bessemer Reb./P.U.	Diff.
70	$10.00	$82.76	$5,093.10

[Plt. Ex. 45]

C A S H I N W I T H C H R Y S L E R

5/1/72 - 6/30/72

Rebate Paid on Sales

JTP Sales	JTP Reb./P.U.	Central Reb./P.U.	Diff.
31	$25.81	$80.43	$1,693.48

[Plt. Ex. 46]

C L E A N - U P A N D C A S H I N

7/1/72 - Fall 1972

Rebate on Sales

JTP Sales	JTP Reb./P.U.	Central Reb./P.U.	Diff.
86	$39.53	$94.44	$4,722.22

[Plt. Ex. 47]

1 9 7 2 S U M M E R S W E E P S T A K E S

4/1/72 - 7/31/72

Rebates on Sales

C/L Group	JTP Sales	JTP Reb./P.U.	Central Reb./P.U.	Diff.
Val-Bar	79	$ -0-	$ 42.02	$ 3,319.58
Sat	45	-0-	68.65	3,089.25
Fy-Ch-Imp	140	-0-	110.00	15,400.00
				$21,808.83
JTP received $9,689 stock rebate on 5%/P.U. but would have made $12,119.83 more under terms of rebate program.				- 9,689.00
				$12,119.83

[Plt. Ex. 48]

C H R Y S L E R - P L Y M O U T H T R I P L E - P A Y

10/1/72 - 12/31/72

Rebates Paid on Sales

El. Units	JTP Reb./P.U.	Central Reb./P.U.	Difference
152	$6.91	$49.23	$6,432.64

[Plt. Ex. 49]

F U R Y - C H R - I M P T W I N D E A L D O L L A R S

1/1/73 - 3/31/73

Rebate Paid on Sales

C/L Group	El. Units	JTP Reb./P.U.	ROE Reb./P.U.	Diff.
(3)	55	$3.636	$78.125	$4,096.88

[Plt. Ex. 50]

CHRYSLER-PLYMOUTH EARLY

CLEAN-UP BONUS PROGRAM

6/1/73 - 1974 Model Day

JTP and Central opted for a Non-Discrimina-tory Program which gave them a 5% rebate on each 1973 Unit.

[Plt. Ex. 51]

S U P E R E A R N I N G

1/1/74 - 3/31/74

Paid on Sales After W/S Obj. Attained

C/L Group	JTP Sales	JTP Reb./P.U.	Roe. Reb./P.U.	Diff.
Val	48	-0-	-0-	-0-
Sat	12	$ 35.00	$100.00	$ 780.00
Ch	19	50.00	150.00	1,900.00
'73 Ch	33	100.00	300.00	6,600.00
				$9,280.00

[Plt. Ex. 52]

P R I M E R A T E O N E I G H T S

4/1/74 - 5/31/74

Paid on Sales After W/S Obj. Attained

C/L Group	JTP Sales	JTP Reb. Rec'd	Others Reb./P.U.	Diff.
Val	13	-0-	$ 50.00	$ 650.00
Sat	5	-0-	100.00	500.00
Ch	12	-0-	150.00	1,800.00
'73 Ch	19	-0-	200.00	3,800.00
				$6,750.00

[Plt. Ex. 53]

"C" BODY BONUS
2/1/74 - 3/31/74
REBATES PAID ON SALES

El. Units	JTP Reb./P. U.	ROE. Reb./P. U.	Diff.
33	$163.64	$90.91	-----

[Plt. Ex. 54]

	DEALER	ADDRESS	EXTENT OF OWNERSHIP INTEREST OF CHRYSLER MOTORS CORP. OR CHRYSLER CORP.	DATE OF COMMENCEMENT (Mo. & Yr.)	DATE OF TERMINATION (Mo. & Yr.)
1.	Hall Motor Co., Inc. dba Bessemer Chrysler-Plymouth changed to Vestavia Chrysler-Plymouth	1024 Montgomery Highway, B'ham, Ala.	None	5/63	3/74
2.	J. Truett Payne Co., Inc.	231 South 22nd Street B'ham, Ala.	None	1/44	8/74
3.	Car Center, Inc. dba Roebuck Chrysler-Plymouth	8949 Gadsden Highway B'ham, Ala.	None	4/67	
4.	Hills Chrysler-Plymouth	1024 Montgomery Highway, B'ham, Ala.	100%	4/74	
5.	Central Motors, Inc.	309 3rd Avenue West B'ham, Ala.	None	4/61	

[Plt. Ex. 55]

Defendant's Exhibit One

DEPOSITION OF J. TRUETT PAYNE

[Def.Ex.1,p.14]

Q. Mr. Payne, I am going to show you a document entitled "Dealer Financial Statement" basically for the year 1967 for the period of 1/67 through 12/31/67, and ask you to look at that, and ask you if that is the financial statement that you filed for the year?

A. I assume that it is.

[Def.Ex.1,p.16]

Q. Mr. Payne, can you tell us what the item on Line 7, Miscellaneous Income, is composed of, or in large parts composed of?

A. I can't tell you exactly. I would have to guess. The auditor could tell you. But I would believe it would be bonuses of some type.

[Def.Ex.1,p.17]

Q. Factory Bonuses under Sales and Incentive Programs?

A. I would believe that. I mean I just don't know. You would have to get that from the auditor.

Q. Looking back on Page 1, again, if you would, Mr. Payne. And first let me ask you this question: is that traditionally the place where you show bonuses, or is there some other place on this financial statement where it appropriately should be shown?

A. I can't answer that question. I just don't know.

Q. And would it be a fair statement to say, Mr. Payne, that what in effect happened was that the Other Income offset the Net Operating Loss by approximately $6,000.00, giving you a net earnings of something over $6,000.00.

A. Yes.

Q. I will ask you a couple more questions if I could about some items on

here. On Page 1, Mr. Payne, in that block at the top of the page on your left beginning with Line 7, entitled Receivable, Item 15, or Line 15 entitled Special Vehicle Income, what is shown in there? I realize you show nothing in there, but what figures would go in there? What does that reflect?

A. I don't know.

Q. You have no idea?

[Def.Ex.1,p.18]

A. I can't answer that question, no, sir.

Q. Okay. On Line 18 there is a space for Inventory Rebates, do you know what would appropriately go in there though you show no entry there?

A. Would that be Inventory Rebate on new automobiles?

Q. I don't know. I am asking you.

A. Well, I am sorry. I can't give you the correct answer. I just

don't know.

Q. Well, Line 9 shown as Vehicle Accounts, you reflect the sum of $65,424.00, what would that sum of money represent, please, sir?

A. I don't know. I can't be positive.

Q. Do you have any idea and judgement as to what you think it might be?

A. Vehicle Accounts? I wouldn't know.

Q. I will ask you to look at the top of that page, on the right hand side the title "Liabilities and Net Worth," under the heading "Wholesale Finance Liability," which shows Total Wholesale Finance Liability of $545,490.75, and ask you what that represents?

MR. REEVES: First of all the form doesn't say that, or that you have in front of him.

Q. I beg your pardon, you are correct. The correction should be, the Total Wholesale Finance Liability is $545,490.75. [Def.Ex.1,p.19]

MR. REEVES: Well, assuming the 75 cents is on the original, we don't have that.

Q. Well, approximately $545,000.00.

A. Well, I would believe that that was the amount of floor plan on the inventory of new cars.

Q. Would that be the amount that you owed Chrysler Credit Corporation?

A. Yes, sir, yes, sir. In my opinion.

Q. Mr. Payne, if you would look on Line 11 on the left under Receivables again.

A. Yes, sir.

Q. Where it says Other Receivables. You show a figure of $72,470.26. What

does that sum Other Receivables represent?

A. I just don't know. I couldn't answer that.

[Def.Ex.1,p.20]

Q. I want to show you a document, Mr. Payne, it is the same document for the year, Dealer Financial Statement for the year 1968. I will ask you again to look on Line 69 on the right hand column Net Earnings, and ask you if it shows net earnings of approximately $36,140.00.

A. Yes, sir.

Q. And you signed that one, that is your signature on that one?

A. Yes, sir.

[Def.Ex.1,p.21]

Q. Would it be your testimony as previously that the $38,000.00 under Miscellaneous Income again would be from bonuses?

A. I don't know.

MR. REEVES: I think he said that was not his testimony. I object to the form of that question.

A. I just don't know what that is. You have got to get that from my auditor. I am just not familiar with it. I don't know what it would be, what it is.

Q. Well, I will ask you if you didn't respond on the prior inquiry on the 1967th Financial Statement that you thought that that was what it was.

A. But I am not sure. I am not sure about that.

[Def.Ex.1,p.37]

Q. All right. And this Miscellaneous Income which is a large portion of the Other Income you have no judgement what that represents?

A. No, sir, no, sir. I just wouldn't want to guess at that.

Q. Who is your accountant?

A. Marion Hardy.

Q. Mr. Hardy is still your accountant?

A. Yes, sir.

Q. And where does he reside?

A. Cleveland, Mississippi.

Q. And is he a CPA?

A. I don't really know. He handled our tax business all the time.

Q. Does he have the financial books and records of the corporation going back for a number of years?

[Def.Ex.1,p.38]

A. Yes, sir.

Q. He does have them in his possession?

A. Yes, sir.

Q. Do you have any financial records of the corporation for any period of time in your possession?

A. I don't know. I would believe that Mr. Hardy had them. I just don't

know.

[Def.Ex.1,p.44]

Q. Mr. Payne, there is an indication in here that your

[Def.Ex.1,p.45]

physical facilities were something less than desirable. Would you have agreed with that observation?

A. Yes.

Q. When was that building constructed, do you know?

A. I don't know. Was it 1925? Or 1935? I just don't remember.

Q. It is an old building?

A. It is an old building.

[Def.Ex.1,p.47]

Q. Well, let me bring you up a little further, or a little closer to date then. In 1971 a Mr. Mullineaux, and a Mr. Reneau from Chrysler Motors Corporation conducted a survey at your request concerning the operation of your dealership.

A. I don't remember. But I remember Mr. Mullineaux, and I assume that they did. I don't know for sure.

Q. Do you recall during that particular period of time that any criticism was made of your used car operation?

[Def.Ex.1,p.48]

A. I don't recall.

Q. Do you recall whether any discussion was had as to your financing operation of new cars?

A. Financing?

Q. Yeah. What is known as your F&I Income.

A. I don't recall that specific incident. But Chrysler Corporation felt that we weren't getting our pro-rata share of financing, and insurance, revenue.

Q. Let me ask you this, Mr. Payne: from 1968 forward or from 1969 forward your dealership showed a continually declining situation in terms of

working capital and net income. Surely there must have been sometime during that period of time when you had discussions with Chrysler Motor Corporation personnel about this situation.

A. Oh, yes. Yes, sir.

Q. All right. And do you recall generally or specifically what their observations were concerning this particular situation, the reason for it?

A. Well, the real reason for it, I mean I think the main reason for it was that they had opened Vestavia Plymouth and prior to that time 67 or 68 percent of our business came from over the mountain. And I think that was more responsible for it than everything else put

[Def.Ex.1,p.49]

together.

[Def.Ex.1,p.52]

Q. All right. What specifically,

forgetting about Chrysler Credit Corporation, what specifically did Chrysler Motors Corporation do wrong in terminating your franchise?

A. Well, just what I said. I mean they put me out of business, and cancelled my franchise.

Q. How did they put you out of business?

A. By putting in additional dealers; building the new buildings to operate in; hiring my employees; just any number of things. And I had been a Chrysler dealer for 29 years, and had never been on COD with them. I asked them to make me a capital loan and they refused to do it. And so they were in collusion with Chrysler Credit Corporation to put me out of business; which they did.

[Def.Ex.1,p.68]

Q. And after May 28, 1974, Mr.

Payne, did you have any intention to continue any automobile business as a Chrysler-Plymouth dealer?

A. After --

Q. After May 28, 1974?

A. Was that after we turned everything over to --

[Def.Ex.1,p.69]

Q. Yes, sir. To Chrysler Credit Corporation.

A. No. I wouldn't think so. I did not know the state of my health at that time. I was out of business. I had no financial connection.

[Def.Ex.1,p.76]

Q. Well, I understand that one of the problems that you had with the business was the fact that they allowed other people to sell Chrysler-Plymouth products in Birmingham.

A. Mr. Hairston, I maintain that they, and according to their Area

Manager, Mr. Oxburn, that they put four Chrysler dealers in Birmingham, and we just could not make it.

Q. So you say they had too many.

A. Yes, sir.

Q. And that was one of the reasons you closed up.

A. Yes, sir.

Q. And the other reason I believe you said is the fact that they curtailed your credit.

[Def.Ex.1,p.77]

A. Yes, sir.

Q. Now the Financial Statements that have been introduced in evidence here show the amount of money that you owed Chrysler Credit for financing your automobiles at various times, is that correct?

A. Yes, sir.

Q. I believe the first statement was 1968 -- 1967. At that time were you

doing business with Chrysler Credit?

A. Yes, sir.

Q. And it showed you owed them $682,000.00.

A. Yes, sir.

Q. And in 1974 the year you closed you owed them $640,000.00. In 1973 you owed them $789,000.00. Is that what you mean by your credit was curtailed?

A. Mr. Hairston, I have never complained about my credit being curtailed on new cars. The thing that put me out of business was when they curtailed my used car operation. And they never did -- I always had enough new cars to sell. That's not what I contend at all.

Q. Well, there wasn't any real dramatic change in the amount of credit that you were actually receiving from Chrysler Credit during the time you were dealing with them, was it?

[Def.Ex.1,p.78]

A. On new cars.

Q. On new; none?

A. I don't know. Right there at the last they might have cut it some. But that is not my argument at all. It is the used car. When they cut my used car credit that is what murdered me.

Q. What did they cut it from to what?

A. They cut it from $100,000.00 to 50. And they put in provisions they agreed they wouldn't do at the time I started doing business with them to where cars had to be sold within 90 days, or something like that.

[Def.Ex.1,p.79]

Q. Your working capital was steadily declining, were they not?

A. Yes, sir, yes, sir.

Q. The volume of your sales were not declining, were they not?

A. No.

Q. So you were still maintaining the same sales level but the cost of doing business was increasing and cutting down your profit picture, is that right?

A. Mr. Hairston, this has come up 20 times before. The thing that murdered me was that I would go and sell a new car and trade in a used car, and because I didn't have the line of credit to put it on my used car lot, I had to take it out and wholesale it. That is what murdered me.

Q. All right. And is that really what you are complaining of?

A. Yes, sir.

Q. You had to wholesale your used cars?

A. Yes, sir.

[Def.Ex.1,p.82]

Q. All right. Now when you say

curtailed the amount of credit on the used cars, you mean the total amount of money that you owed Chrysler Credit on the used cars?

A. They gave me a used car line of credit of $100,000.00, which meant that I could have $100,000.00 worth of used cars in stock. And they cut that to 50. And with the amount of business we were doing we couldn't operate with

[Def.Ex.1,p.83]

that. We had to wholesale the cars and we just couldn't get out enough profit.

Q. All right, now. Are these Dealer Financial Statements that have been introduced into evidence shows that during the period of 1967 you owed Wholesale Financial Liability on used cars and trucks $15,370.00. And in the January 1, 1974, statement through March 30, 1974, you owed Wholesale Finance Liability of $93,603.00. Is that what

you call curtailing your credit?

MR. REEVES: I object to the form of that question.

Q. Sir?

A. What I am talking about is they cut my wholesale line of credit from $100,000.00 to 50. And then forced me to reduce the used cars that I had in stock. Now I guess the reason we didn't have as many is because we were wholesaling.

BIRMINGHAM METRO FLEET COMPARISON

Year	Program	J. Truett Payne Co., Inc. 61-07178	Central Mtrs., Inc. 61-61635	Hall Mtr. Co. Vestavia C/P 61-62077	Roebuck C/P/IMP. 61-62694
1971-1972	Dealer Fleet Selling Plan — Rule 1	$19,935.00	$2,205.00	$ 665.00	$ 850.00
1973	Fleet Purchase Program				
	Dealer Selling Allowance	17,775.00	1,575.00	950.00	450.00
	Dealer Incentive Allow.	7,690.00			
1974	Fleet Purchase Program				
	Dealer Selling Allowance	12,945.00	1,405.00	110.00	4,345.00
	Dealer Incentive Allow.	3,840.00			1,540.00
	TOTAL	$62,185.00	$5,185.00	$1,725.00	$7,185.00

[Def. Ex. 27]

BIRMINGHAM METRO INCENTIVE COMPARISON

Program	J. Truett Payne Co., Inc. 61-07178	Central Mtrs., Inc. 61-61635	Hall Mtr. Co. Vestavia C/P 61-62077	Roebuck C/P/IMP. 61-62694
Winter Winners	$ -0-	$ 5,310.00	$ 3,015.00	$ 8,310.00
Big Dollar Payoff	23,850.00	1,931.25	3,900.00	12,025.00
Summer Sellout	3,040.00	5,660.00	5,925.00	12,800.00
Stock Eliminator	13,550.00	14,825.00	7,450.00	10,350.00
Winter Profit Days	-0-	-0-	4,450.00	6,525.00
Chrysler/Fury Profit	700.00	100.00	4,800.00	1,100.00
Sell Now	3,760.00	5,790.00	7,550.00	8,525.00
Summer Sweepstakes	-0-	25,695.00	18,540.00	26,095.00
Cash in With Chrysler	800.00	1,850.00	850.00	200.00
Clean Up & Cash In	3,400.00	6,800.00	4,000.00	3,400.00
Triple Pay	1,050.00	6,450.00	750.00	1,350.00
1972 5% Stock Rebate	9,689.20			
Twin Deal Dollars	200.00	200.00	-0-	5,000.00
Early Clean Up Bonus	-0-	-0-	17,600.00	16,325.00
1973 5% Stock Rebate	28,628.58	15,538.04	-0-	-0-
Cricket Profit Plus	200.00	100.00		
Super Earnings	4,670.00	-0-	OUT OF	10,850.00
Prime Rate on 8's	-0-	6,350.00	BUSINESS	10,250.00
"C" Body Bonus	5,400.00	800.00		1,000.00
"B" Body Bonus				
C/P Holiday Bonus		200.00		300.00
TOTAL	$98,937.78	$97,599.29	$78,830.00	$134,405.00

[Def. Ex. 28]

BIRMINGHAM METRO SALES COMPARISON Period 1971 - 1973

	NEW VEHICLES Sales			Average Gross Profit		Total Profit	
1971	Retail	Fleet	Total	Retail	Fleet	Gross	Net
J. Truett Payne Co.	562	161	723	390	208	$252,389	$ 72,215
Vestavia Chry.-Ply.	369	4*	373	385	na	143,492	48,788
Central Motors	467	16*	483	311	na	150,156	13,085
Roebuck Chry.-Ply.-Imp.	688	4*	692	335	na	232,054	17,779
1972							
J. Truett Payne Co.	576	185	761	425	242	289,579	104,700
Vestavia Chry.-Ply.	568	4*	572	435	na	248,651	113,118
Central Motors	585	17*	602	372	na	223,776	75,472
Roebuck Chry.-Ply.-Imp.	765	5*	770	342	na	263,485	20,455
1973							
J. Truett Payne Co.	567	210	777	435	312	312,008	110,853
Vestavia Chry.-Ply.	549	10*	559	361	na	201,641	23,164
Central Motors	399	20*	419	392	na	164,147	32,081
Roebuck Chry.-Ply.-Imp.	753	5*	758	380	na	287,787	36,248

*Dealer's financial statements do not reflect Fleet Sales. Fleet unit sales quantities obtained from the "Dealer Fleet Selling Plan Summary"

Period 1971 through 1973

	Total New Unit Sales	Total Fleet Unit Sales	Fleet Sales % of Total
J. Truett Payne Co.	2,261	547	24.2%
Vestavia Chry.-Ply.	1,504	18	1.1%
Central Motors	1,504	53	3.5%
Roebuck Chry.-Ply.-Imp.	2,220	14	.6%

[Def. Ex. 31 - Pg. 1 of 2 Pgs.]

BIRMINGHAM METRO SALES COMPARISON Period 1971 - 1973

	USED VEHICLES				
		Total Profit			
	Unit Sales	Average Gross Profit	Gross	Net	Net Earnings Before Taxes
1971					
J. Truett Payne Co.	803	$104	$ 83,461	$ 10,721	$(27,354)
Vestavia Chry.-Ply.	381	291	110,894	44,855	6,684
Central Motors	1,079	188	202,821	96,281	54,651
Roebuck Chry.-Ply.-Imp.	1,761	232	408,519	162,497	47,752
1972					
J. Truett Payne Co.	931	$123	$114,901	$ 24,708	$(8,206)
Vestavia Chry.-Ply.	753	155	116,854	39,153	4,519
Central Motors	954	165	157,042	64,291	93,052
Roebuck Chry.-Ply.-Imp.	1,914	246	470,748	173,001	36,378
1973					
J. Truett Payne Co.	768	$108	$ 82,788	$ 9,114	$(53,510)
Vestavia Chry.-Ply.	710	231	163,867	53,300	(80,234)
Central Motors	735	253	185,607	104,055	36,065
Roebuck Chry.-Ply.-Imp.	1,985	245	486,395	181,728	50,053

[Def. Ex. 31 - Pg. 2 of 2 Pgs.]

Defendant's Exhibit Thirty Six

Dealer	Incent.$	Units	$P.U.
1971			
Payne	40,440	562	$72
Central	27,726	467	$59
Roebuck	43,485	688	$63
Vestavia	20,290	369	$55
1972			
Payne	19,399	576	$34
Central	46,685	585	$80
Roebuck	47,195	765	$62
Vestavia	40,940	568	$72
1973			
Payne	29,029	567	$51
Central	15,838	399	$40
Roebuck	21,325	753	$28
Vestavia	17,600	549	$32

Defendant's Exhibit Thirty Seven

Average

Dealer	Incent.$	Units	$P.U.
Payne	88,868	1705	$52
Central	90,249	1451	$62
Roebuck	112,005	2206	$51
Vestavia	78,838	1486	$53

Defendant's Exhibit Thirty Nine

SERVICE PARTS

Year	Service/net	Pnus.
1970	46,630	$85
1971	34,033	$47
1972	28,348	$37
1973	24,088	$31

Year	Parts-net	Pnus.
1970	52,738	$96
1971	47,871	$66
1972	44,248	$58
1973	46,345	$60

Defendant's Exhibit Forty

USED CAR

	Net Profit	Units Sold	Puur.
	1970		
Payne	$35,300	694	$51
Cent.	114,300	1,060	$108
Roeb.	215,700	1,761	$122
Vest.	41,200	242	$170
	1971		
Payne	10,700	803	$13
Cent.	96,300	1,079	$89
Roeb.	162,500	1,761	$92
Vest.	44,900	381	$118

Net Profit		Units Sold	Puur.
1972			
Payne	24,700	931	$27
Cent.	64,300	954	$67
Roeb.	173,000	1,914	$90
Vest.	39,200	753	$52
1973			
Payne	$ 9,100	768	$12
Cent.	104,100	735	$142
Roeb.	181,700	1,985	$92
Vest.	53,300	710	$75

[Def. Ex. 41]

PROOF OF SERVICE

I, C. Lee Reeves, attorney for J. Truett Payne Company, Inc., a corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the ..... day of ....., 198..., I served copies of the above and foregoing Joint Appendix to the Supreme Court of the United States by mailing and depositing same in the United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to Hon. J. Fredric Ingram and Hon. J. Ross Forman, III, 1600 Bank for Savings Building, Birmingham, Alabama 35203, attorneys for Chrysler Motors Corporation, a corporation.

It is further certified that all parties required to be served have been served.

This the ..... day of ....., 198....

C. Lee Reeves
Attorney for J. Truett Payne Company, Inc., Petitioner
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Birmingham, Alabama 35255
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